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# THE POSSIBILITY OF PROSECUTING CORPORATIONS FOR CLIMATE CRIMES BEFORE THE INTERNATIONAL CRIMINAL COURT: ALL ROADS LEAD TO THE ROME STATUTE?

*Donna Minha*\*

## I. INTRODUCTION

In its most recent “Policy Paper on Case Selection and Prioritisation” (issued in September 2016),<sup>1</sup> the Office of the Prosecutor (“OTP”) of the International Criminal Court (“ICC” or “the Court”) declared that it would

give particular consideration to prosecuting Rome Statute<sup>2</sup> crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources, or the illegal dispossession of land.<sup>3</sup>

The policy paper, which has yet to be practically implemented, was issued in conjunction with the conviction in the *Al Mahdi* case,<sup>4</sup> in which Mr. Al Mahdi was prosecuted solely for the war crime of attacking historic and religious buildings in Timbuktu.<sup>5</sup> Though not facially related to environmental crimes, the *Al Madhi* case may be seen as demonstrating the OTP’s willingness to prosecute crimes which were not committed directly against people, but still have a powerful effect on them.<sup>6</sup> Therefore, this case may

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\* Ph.D. candidate, the Hebrew University of Jerusalem. I would like to express my sincere gratitude and great appreciation to Professor Yuval Shany and Professor David Hunter, my research supervisors, for their incredibly valuable guidance. I would also like to thank Lindsay Bernsen Wardlaw and the editors at the *Michigan Journal of International Law* for their excellent editorial work.

1. OFFICE OF THE PROSECUTOR [“OTP”], POLICY PAPER ON CASE SELECTION AND PRIORITISATION, ¶ 41 (2016) [hereinafter OTP Policy Paper].

2. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, (entered into force July 1, 2002) [hereinafter Rome Statute].

3. OTP POLICY PAPER, *supra* note 1, ¶¶ 7, 40, 41. The OTP has also noted that it will “seek to cooperate and provide assistance to States, upon request, with respect to conduct which constitutes a serious crime under national law, such as the illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes, land grabbing or the destruction of the environment.”

4. Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment and Sentence (Sept. 27, 2016).

5. *Id.* ¶¶ 2, 10.

6. See also OTP POLICY PAPER, *supra* note 1, ¶ 46 (stating that “[t]he Office . . . will also pay particular attention to attacks against cultural, religious, historical and other protected

serve as another indication of the general direction in which the OTP seeks to move with regard to the investigation and prosecution of environmental crimes.

In this context, it goes without saying that non-state actors such as multinational corporations, are frequently implicated in environmental destruction.<sup>7</sup> Thus, arguably, the goal of investigating and prosecuting environmental crimes—as set forth by the OTP in its policy paper—would not be completely achieved without taking into account environmental harm caused by multinational corporations. Thus, this article explores the possibility of prosecuting multinational corporations for environmental crimes before the ICC, and evaluates the applicability of the different core crimes listed in the Rome Statute of the International Criminal Court (“the Rome Statute” or “the Statute”) to corporate environmental crimes.

As a test case, this article will focus on the allegedly illegal conduct of oil and gas corporations that has been claimed to substantially contribute to climate change and to its devastating effects. Today, scientists can trace the contributions of individual companies to specific climate impacts, such as the increase in global surface temperatures and sea level rise.<sup>8</sup> As a result, the causal chain between global greenhouse gas (“GHG”) emissions attributed to a small number of oil and gas corporations, on one hand, and severe climate impacts, on the other hand, is getting clearer. These scientific advances are accompanied by the publication of documents and studies suggesting that the oil and gas industry had knowledge of climate change as early as sixty years ago, and yet, it has actively promoted climate change denial using industry-funded research aimed at increasing public skepticism about climate change.<sup>9</sup>

There have been several attempts to hold certain oil and gas companies accountable for their allegedly illegal conduct at the national level, either through lawsuits brought by state Attorneys General in the United States,<sup>10</sup>

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objects”). The ICC Trial Chamber VIII subsequently convicted Mr. Al Mahdi and sentenced him to nine years of imprisonment. *Prosecutor v. Al Mahdi*, Judgment and Sentence, ¶¶ 63, 109.

7. See HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* (4th ed. 2011), at 1374–75.

8. See *infra* Part II.

9. See *infra* Part II.B.

10. On October 24, 2018, New York’s Attorney General filed a complaint against Exxon Mobil in the Supreme Court of the State of New York. The complaint stated that:

This case seeks redress for a longstanding fraudulent scheme by Exxon, one of the world’s largest oil and gas companies, to deceive investors and the investment community, including equity research analysts and underwriters of debt securities (together, “investors”), concerning the company’s management of the risks posed to its business by climate change regulation. Exxon provided false and misleading assurances that it is effectively managing the economic risks posed to its business by the increasingly stringent policies and regulations that it expects governments to adopt to address climate change . . .

claiming deceitful acts against investors and consumers, or through actions mainly brought by U.S. counties and cities, seeking money damages for climate change-related losses.<sup>11</sup> Cases of the latter kind are anticipated to increase with the growing body of research and documents demonstrating the causal link between GHG emissions and specific climate impacts.<sup>12</sup>

It may be argued that, in addition to these proceedings, the alleged conduct of the fossil fuel corporations should also be of concern to the international community as a whole due to its widespread and irreversible consequences, which go far beyond national borders and impact communities, wildlife, and future generations. Arguably, those who are found responsible for these impacts should be held criminally accountable for their conduct in the international sphere, as “a reflection of the ‘outraged conscience of the

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Complaint ¶ 1, *New York v. Exxon Mobil Corp.*, 65 Misc. 3d 1233 (Sup. Ct. N.Y. 2019) (No. 452044/2018), 2019 WL 679577165. The case was dismissed on December 10, 2019. In its dismissal, the court pointed out that,

[n]othing in this opinion is intended to absolve ExxonMobil from responsibility for contributing to climate change through the emission of greenhouse gases in the production of its fossil products. ExxonMobil does not dispute either that its operations produce greenhouse gases or that greenhouse gases contribute to climate change. But ExxonMobil is in business of producing energy, and this is a securities fraud case, not a climate change case.

*New York v. Exxon Mobil Corp.*, No. 452044/2018, 2019 WL 679577165, at \*2 (Sup. Ct. N.Y. 2019). In October 2019, a complaint was filed against ExxonMobil by the Commonwealth of Massachusetts, claiming that the company “systematically and intentionally, has misled Massachusetts investors and consumers about climate change.” Complaint ¶ 1, *Massachusetts v. Exxon Mobil Corporation* (Super. Ct. Mass. filed Oct. 24, 2019) (No. 19-1333). On June 24 2020, the state of Minnesota filed a complaint against the American Petroleum Institute, Exxon Mobil Corp and Koch Industries, seeking to hold them

accountable for deliberately undermining the science of climate change, purposefully downplaying the role that the purchase and consumption of their products played in causing climate change and the potentially catastrophic consequences of climate change, and for failing to fully inform the consumers and the public of their understanding that without swift action, it would be too late to ward off the devastation.

Complaint ¶ 8, *Minnesota v. Am. Petroleum Inst. et al.* (Minn. Dist. Ct.) (No. 62-CV-20-3837), [https://www.ag.state.mn.us/Office/Communications/2020/docs/ExxonKochAPI\\_Complaint.pdf](https://www.ag.state.mn.us/Office/Communications/2020/docs/ExxonKochAPI_Complaint.pdf).

11. Cities and counties in California, New York, Colorado, Washington state, and Maryland have filed civil lawsuits against oil and gas companies seeking to hold them responsible for the costs of dealing with the consequences of climate change. See David Hasemyer, *Fossil Fuels on Trial: Where the Major Climate Change Lawsuits Stand Today*, INSIDE CLIMATE NEWS (July 22, 2019), <https://insideclimatenews.org/news/04042018/climate-change-fossil-fuel-company-lawsuits-timeline-exxon-children-california-cities-attorney-general>; see also SABIN CENTER FOR CLIMATE CHANGE LAW, *Climate Change Litigation Database*, <http://climatecasechart.com>.

12. See CHRIS WOLD ET AL., CLIMATE CHANGE AND THE LAW 783 (2009); James Salzman & David Hunter, *Negligence in the Air: The Duty of Care in Climate Change Litigation*, 156 U. PA. L. REV. 1741, 1763 (2007).

world.”<sup>13</sup> Therefore, this article focuses on the possibility of investigating and prosecuting fossil fuel companies for the crimes listed in the Rome Statute.

This notion poses a twofold challenge: First, it requires an expansion of the list of potential perpetrators to include multinational corporations (the Court’s personal jurisdiction). Second, it requires recognition of a new pattern of crime as within the jurisdiction of the Court (subject-matter jurisdiction). Both moves should be examined with caution since, as a source of international criminal law, the Rome Statute is governed by the principle of *nullum crimen sine lege* (“no crime without law”). Additionally, any effort to hold corporations accountable for alleged climate crimes is limited to acts committed after the entry into force of the Statute in 2002.<sup>14</sup>

This article will proceed as follows: After a brief overview of the latest studies regarding the alleged conduct of the oil and gas industry, and its contribution to the climate crisis, the article will explore the issue of the Court’s personal jurisdiction, *i.e.*, whether criminal responsibility may be attributed to legal persons—such as corporations—under the Rome Statute. This will be followed by a discussion of subject-matter jurisdiction, in which the article will examine whether the alleged conduct of fossil fuel companies amounts to one or more of the core crimes defined in the Rome Statute. In this context, the article will analyze the elements of different core crimes in light of the jurisprudence of relevant criminal tribunals, as well as the elements’ drafting history and their object and purpose. This will be followed by an examination of different procedural hurdles to prosecuting climate crimes. Finally, the article will assess whether the Rome Statute’s existing crimes may and should be interpreted to include environmental crimes.

## II. RECENT STUDIES AND RESEARCH WITH REGARD TO THE OIL AND GAS INDUSTRY

In the past several years, there has been a proliferation of studies pertaining to fossil fuel companies, which can be classified into two categories: The first category of studies demonstrates the causal link between specific damages and emissions attributed to major fossil fuel producers (this category will be referred to as “causation studies”). The second category focuses on the conduct of the oil and gas industry, suggesting that fossil fuel and cement companies knew about climate change and its devastating impacts, and yet, they did not disclose this information to the public and to their shareholders and even engaged in activities aimed at spreading uncertainty and skepticism with regard to this issue (this category of studies will be re-

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13. PHILIPPE SANDS, *EAST WEST STREET* 113 (2016) (citing ELIHU LAUTERPACHT, *LIFE OF HERSCH LAUTERPACHT* 274 (2010)).

14. Rome Statute, *supra* note 2, arts. 11, 24; *see infra* Part V.

ferred to as “conduct studies and findings”). Both categories of research are presented below.

### A. Causation Studies

In a 2013 study, researcher Richard Heede provided a quantitative analysis of historic emissions of industrial carbon dioxide and methane from 1751 through 2010, focusing on fossil fuel producers and cement manufacturers.<sup>15</sup> This research identified that a group of ninety corporate investor-owned and state-owned producers of fossil fuels and cement was responsible for approximately two-thirds of industrial carbon emissions.<sup>16</sup> This groundbreaking study showed for the first time that a relatively small number of corporations, that have been benefitting from emitting greenhouse gases to the atmosphere, made a major contribution to global warming.<sup>17</sup>

Subsequently, an analysis released by the Climate Accountability Institute and Carbon Disclosure Project in June 2017 demonstrated that twenty-five corporate and state-owned fossil fuel producing entities have accounted for 51% of global industrial greenhouse gas emissions since 1988.<sup>18</sup>

In a 2017 study,<sup>19</sup> Richard Heede, together with researchers from the Union of Concerned Scientists and Oxford University (building on his earlier 2013 study), managed to link these historic emissions to specific climate impacts. The model-based study quantified the contribution of historical and recent emissions traced to ninety major industrial carbon producers and the historical rise in global atmospheric CO<sub>2</sub>, surface temperatures, and sea level.<sup>20</sup>

15. Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010*, 122 CLIMATE CHANGE 229, 220 (2014).

16. *Id.* at 234–35. In an update released in October 2019, Professor Heede and the Climate Accountability Institute published new data showing that from 1965 to 2017, the twenty largest fossil fuel companies have emitted 35% of all fossil fuel emissions worldwide. See CLIMATE ACCOUNTABILITY INSTITUTE, *Carbon Majors: Update of Top Twenty Companies 1965–2017* (Oct. 9, 2019), <https://climateaccountability.org/pdf/CAI%20PressRelease%20Top20%20Oct19.pdf>.

17. See David Hunter, *Making Private Companies Pay Their Share for Climate Change: A New Study Could Revive Climate Change Litigation*, CENTER FOR PROGRESSIVE REFORM: CPR BLOG (Nov. 26, 2013), <http://progressivereform.org/CPRBlog.cfm?idBlog=9571E4DE-EB05-C8DC-9BC39306A6CCED17> (arguing that this study is a potential game changer, since it shows that people and private companies are not equally responsible for climate change).

18. See PAUL GRIFFIN, CLIMATE ACCOUNTABILITY INSTITUTE, THE CARBON MAJORS DATABASE CDP CARBON MAJORS REPORT 8 (2017), <https://6fefcbb86e61af1b2fc4-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf>.

19. See B. Ekwurzel et al., *The Rise in Global Atmospheric CO<sub>2</sub>, Surface Temperature, and Sea Level from Emissions Traced to Major Carbon Producers*, 144 CLIMATE CHANGE 579, 579 (2017).

20. *Id.* The study showed that “emissions traced to these 90 carbon producers contributed <57% of the observed rise in atmospheric CO<sub>2</sub>, <42–50% of the rise in global mean sur-

### B. Conduct Studies and Findings

In a study published in 2017,<sup>21</sup> two Harvard University researchers made an empirical, document-by-document analysis and comparison of the text of 187 communications related to climate change released voluntarily by ExxonMobil.<sup>22</sup> They examined whether these communications sent consistent messages about the state of climate science and its implications.<sup>23</sup> They concluded that “[a]vailable documents show a discrepancy between what ExxonMobil’s scientists and executives discussed about climate change privately and in academic circles and what it presented to the general public.”<sup>24</sup> The study found that in private, the company “broadly acknowledged that anthropogenic global warming (“AGW”) is real, human-caused, serious, and solvable, while identifying reasonable uncertainties that most climate scientists readily acknowledged at that time.”<sup>25</sup> However, “[i]n contrast, ExxonMobil’s advertorials in the NYT overwhelmingly emphasized only the uncertainties, promoting a narrative inconsistent with the views of most climate scientists, including ExxonMobil’s own.”<sup>26</sup> The study concluded that, “In light of these findings, . . . ExxonMobil’s AGW communications were misleading,” but the researchers could not judge “whether they violated any laws.”<sup>27</sup>

Additionally, a comprehensive report by the Center for International Environmental Law (“CIEL”), published in November 2017, presented a synthesis of the available evidence “on what the oil industry knew about climate science, when they knew it, and what they did with the information.”<sup>28</sup> This report found that “[t]he oil industry was expressly warned of the potential severity of climate risks by its own consulting scientists in 1968 and repeatedly thereafter,” and that “[n]umerous industry documents demonstrate these risks were communicated by industry scientists to executives at the highest levels of the industry over the ensuing decades.”<sup>29</sup> The

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face temperature (GMST), and <26–32% of global sea level (GSL) rise over the historical period and <43% (atmospheric CO<sub>2</sub>), <29–35% (GMST), and <11–14% (GSL) since 1980.” *Id.*

21. Geoffrey Supran & Naomi Oreskes, *Assessing ExxonMobil’s Climate Change Communications (1977–2014)*, 2017 ENV’T RES. LETTERS 1, 1 (2017).

22. These documents were released by ExxonMobil itself, wishing to demonstrate that allegations against it were baseless. The company challenged the public to “read all of these documents and make up your own mind.” *Id.* at 1–2.

23. *Id.* at 2.

24. *Id.* at 15.

25. *Id.* at 15.

26. *Id.* at 15.

27. *Id.* at 15.

28. CIEL, SMOKE AND FUMES: THE LEGAL AND EVIDENTIARY BASIS FOR HOLDING BIG OIL ACCOUNTABLE FOR THE CLIMATE CRISIS 36 (2017), <https://www.ciel.org/wp-content/uploads/2019/01/Smoke-Fumes.pdf> [hereinafter CIEL, SMOKE AND FUMES REPORT]. Appendix II of the report describes the different sources on which the report builds.

29. *Id.* at 24.

report also suggested that “industry research into air pollution issues was highly coordinated and shared widely within the industry, and included research into fossil carbon in the atmosphere by no later than 1958.”<sup>30</sup> However, despite this, “[i]ndustry records and other sources indicate that this coordinated industry research program was used to mobilize public opposition to the regulation of air pollutants by sowing doubt regarding air pollution science.”<sup>31</sup>

The report demonstrated that “[i]n late 1946, executives from the major petroleum companies . . . established the ‘Committee on Smoke and Fumes of the Western Oil and Gas Association’ to fund research into the causes of air pollution in Southern California.”<sup>32</sup> The report further noted that:

Industry records, oral histories from persons involved, and analyses of its activities by independent researchers strongly indicate that the core mission of the Smoke and Fumes Committee was to combine industry-funded research and public relations advocacy in order to increase public skepticism about air pollution science, with the express purpose of influencing legislation and regulation on pollution issues.<sup>33</sup>

The report also showed that “[e]ven while blocking public action to address climate change, oil companies took steps to protect their own assets from climate risks. This divergence between industry communications to the public and industry action to safeguard their own investments began as early as the 1970s and is well established by the 1980s.”<sup>34</sup> The report concluded that “[n]otwithstanding their own best information, leading oil companies and industry associations actively participated in or funded climate misinformation efforts for decades through media intended to reach wide audiences of consumers, investors, and the general public.”<sup>35</sup>

Whereas the research and studies mentioned above focus on U.S. companies, similar efforts were allegedly made by fossil fuel companies in other jurisdictions as well. According to the report,

[e]vidence suggests that European companies such as British Petroleum (United Kingdom) and Royal Dutch Shell (Netherlands and United Kingdom) participated in multiple aspects of US climate denial efforts dating back to the original Smoke and Fumes Com-

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30. *Id.* at 24.

31. *Id.* at 24.

32. *Id.* at 8.

33. *Id.* at 21.

34. *Id.* at 24.

35. *Id.* at 24.



mittee, either directly through their US subsidiaries or through companies they later acquired.<sup>36</sup>

Other publications also suggest that European oil and gas companies have lobbied against climate action and clean energy.<sup>37</sup>

### C. *Interim Conclusions*

In summary, scientific advances make it possible to quantifiably link the contribution of GHG emissions attributed to a relatively small number of companies and specific climate impacts. Additionally, a growing body of research indicates that fossil fuel companies allegedly led a disinformation campaign for decades, while peddling a product they knew with substantial certainty would increase temperatures enough to cause the impacts of climate change.

This article will examine whether the alleged conduct of fossil fuel companies may be prosecuted as a crime before the ICC. First, however, the article will explore the issue of criminal responsibility of legal persons under the Rome Statute.

## III. CORPORATE LIABILITY UNDER THE ROME STATUTE

Article 25(1) of the Rome Statute states that “[t]he Court shall have jurisdiction over natural persons pursuant to this Statute.” This language was aimed at clarifying, in “an indirect way . . . that the Court does not have jurisdiction over corporate bodies.”<sup>38</sup>

The controversy pertaining to the inclusion of legal persons within the jurisdiction of the Court was described by the Preparatory Committee on the Establishment of an International Criminal Court:

There is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute. Many delegations are strongly opposed, whereas some strongly favour its inclusion. Others have an open mind. Some delegations hold the view that providing for only the civil or administrative responsibil-

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36. *Id.* at 25; *see also* CIEL, A CRACK IN THE SHELL: NEW DOCUMENTS EXPOSE A HIDDEN CLIMATE HISTORY (2018), <https://www.ciel.org/wp-content/uploads/2018/04/A-Crack-in-the-Shell-April-2018.pdf>.

37. CIEL, SMOKE AND FUMES REPORT, *supra* note 28, at 25; *see also* Arthur Neslen, *BP Lobbied Against EU Support for Clean Energy to Favour Gas, Documents Reveal*, *GUARDIAN* (Aug. 20, 2015), <https://www.theguardian.com/environment/2015/aug/20/bp-lobbied-against-eu-support-clean-energy-favour-gas-documents-reveal>; Arthur Neslen, *BP Tops the List of Firms Obstructing Climate Action in Europe*, *GUARDIAN* (Sept. 21, 2015), <https://www.theguardian.com/environment/2015/sep/21/bp-tops-the-list-of-firms-obstructing-climate-action-in-europe>.

38. *See* WILLIAM A. SCHABAS, A COMMENTARY ON THE ROME STATUTE 564 (2d ed. 2016) [hereinafter SCHABAS COMMENTARY].

ity/liability of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed. Some delegations, who favour the inclusion of legal persons, hold the view that this expression should be extended to organizations lacking legal status.<sup>39</sup>

The final decision to exclude legal persons from the Court's jurisdiction was based on several grounds. When the provision was drafted, the concept of corporate liability was not universally recognized, and many states did not allow for corporate criminal responsibility under their domestic legal regimes; thus, it was claimed, the inclusion of such a provision would have proved to be a major obstacle with regard to the principle of complementarity (article 17 of the Statute),<sup>40</sup> according to which the states have the primary responsibility to prosecute international crimes. There were also concerns with regard to the ramifications such a move would have on evidentiary issues, and it was claimed that "the inclusion of collective liability would detract from the Court's jurisdictional focus, which is on individuals."<sup>41</sup> When these issues could not be settled by consensus in the time allotted, the drafters finally chose to explicitly include only natural persons in the language of article 25(1).<sup>42</sup>

However, twenty years after the drafting of the Rome Statute, a growing number of legal systems across the globe have recognized the principle of corporate criminal liability for atrocity crimes,<sup>43</sup> by adding offenses pertaining to corporate liability to their criminal codes.<sup>44</sup> This development has been accompanied by international instruments, such as multinational treaties, aimed at holding corporations accountable through provisions on corporate criminal liability.<sup>45</sup> Other developments regarding corporate criminal

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39. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Addendum, Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/2/Add.1, ¶ 49, n.3 (Apr. 14, 1998).

40. See OTTO TRIFFTERER & KAI AMBOS, A COMMENTARY TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 986 (3d ed. 2016) [hereinafter TRIFFTERER COMMENTARY]; Caroline Kaeb, *The Shifting Sands of Corporate Liability Under International Criminal Law*, 49 GEO. WASH. INT'L. REV. 351, at 353.

41. TRIFFTERER COMMENTARY, *supra* note 40, at 986.

42. See Brief from David J. Scheffer as Amicus Curiae in Support of the Issuance of a Writ of Certiorari, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 2011 WL 6813576, at 14 (U.S., Dec. 20, 2011).

43. Kaeb, *supra* note 40, at 351–52 (2016); see also Brief from David J. Scheffer as Amicus Curiae in Support of the Issuance of a Writ of Certiorari, *supra* note 42, at 6.

44. See Kaeb, *supra* note 40, at 352.

45. *Id.* at 352 n.5; CEDRIC RYNGAERT & JEAN D'ASPREMONT, THE INTERNATIONAL LAW ASSOCIATION WASHINGTON CONFERENCE NON-STATE ACTORS 3RD REPORT PREPARED BY THE CO-RAPPORTEURS (2014). Interestingly, many of these treaties are environmental ones.

liability in the international sphere that may indicate a somewhat similar trend are examined below.

#### A. *The STL Contempt Case*

In a decision issued in October 2014, the appeals panel of the Special Tribunal for Lebanon (“STL”) held that the term “person” in rule 60 *bis* of the STL’s Rules of Procedure and Evidence<sup>46</sup> should be interpreted to include legal entities, allowing contempt charges to be brought against a corporate entity (New TV S.A.L.).<sup>47</sup>

The Tribunal noted “the growing number of states criminalizing the acts and conducts of legal persons,”<sup>48</sup> and the “concrete movement on an international level backed by the United Nations for, *inter alia*, corporate accountability.”<sup>49</sup> The Tribunal also referred to a recent study commissioned by the Office of the High Commissioner for Human Rights concerning the effectiveness of domestic judicial mechanisms in relation to corporations, which concluded that “most jurisdictions appear to recognise the possibility of corporate criminal responsibility (if not as a general concept then at least in relation to specific offences or types of offences).”<sup>50</sup>

The Tribunal further stressed that “[i]nternational law has long since recognised the exposure of non-human entities to liability under international standards,”<sup>51</sup> referring to the enforcement of the international prohibition on the slave trade by condemning the vessel involved<sup>52</sup> and to the Charter of the International Military Tribunal (“IMT”) at Nuremberg, which authorized the designation of “any group or organisation as criminal.”<sup>53</sup>

The Tribunal concluded that “given all the developments outlined above, corporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international

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46. SPECIAL TRIBUNAL FOR LEBANON [“STL”], *Rules of Procedure and Evidence*, <https://www.stl-tsl.org/en/documents/legal-documents/rules-of-procedure-and-evidence> (last visited June 3, 2020).

47. In the Case Against New TV S.A.L. & Karma Mohamed Tahsin al Khayat, STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, ¶ 74 (Special Trib. for Leb. Oct. 2, 2014).

48. *Id.* ¶ 44.

49. *Id.* ¶ 46 (citing the U.N. Human Rights Council, The U.N. Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, UN Doc A/HRC/17/31 (Mar. 21, 2011)).

50. *Id.* ¶¶ 52, 55. The Tribunal acknowledged that some jurisdictions do not recognize this possibility, but stated that “[t]his does not mean that corporate entities in these jurisdictions (which include Germany, Italy and Ukraine) enjoy complete impunity. Instead, corporate wrongdoing is dealt with through a system of administrative offences and penalties.” *Id.* ¶ 49.

51. *Id.* ¶ 61.

52. *Id.* ¶ 61.

53. *Id.* ¶ 63.

law”<sup>54</sup> and added that it “simply cannot ignore the reality that many corporations today wield far more power, influence and reach than any one person.”<sup>55</sup> The tribunal also noted that “the prosecution of natural persons, rather than the legal persons that they serve, would fail to underline and punish corporate cultures that condone and in some cases encourage illegal behaviour. Punishing only natural persons in such circumstances would be a poor response where the need for accountability lies beyond any one person.”<sup>56</sup>

In a dissenting opinion, Judge Akoum asserted that “the word ‘person’ as contained in Rule 60 *bis* cannot be interpreted to include legal persons.”<sup>57</sup> Hence, he was of the view that New TV S.A.L. could not be charged with contempt.

It should be emphasized though, that Judge Akoum “offer[ed] no view on whether or not customary international law or general principles of law presently recognise corporate criminal liability,” and his approach derived from the “fundamental and holy principles of criminal law: *nullum crimen sine lege scripta* (crimes must be based on written provisions), *nullum crimen sine lege stricta* (strict construction of criminal provisions) and *in dubio pro reo* (when in doubt, side for the accused).”<sup>58</sup>

Though the *STL Contempt* decision is a significant development in the context of international corporate criminal liability, the applicability of this decision to the ICC is limited, for three main reasons. First, the context of the decision as a contempt decision (which relates to the STL’s Rules of Procedure and not to the crimes listed in the STL Statute) makes it less relevant with respect to the prosecution of legal entities for the core crimes listed in the Rome Statute. Second, there is a major difference between the language of the provisions at issue: Whereas rule 60 *bis* of the STL Rules of Procedure and Evidence uses the word “person,” article 25(1) of the Rome Statute explicitly refers to “natural persons.” This is all the more striking as rule 2 of the STL Rules of Procedure and Evidence defines a “victim” as “a natural person;” therefore, there is a strong case that the use of the general term “person” in article 60 *bis* may refer to either a natural person or a legal one. Third, the hybrid nature of the Tribunal, which applies domestic Lebanese law,<sup>59</sup> also limits the relevance of this decision to the ICC.<sup>60</sup>

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54. *Id.* ¶ 67.

55. *Id.* ¶ 82.

56. *Id.* ¶ 83.

57. *Id.* ¶ 26 (Akoum, J., dissenting).

58. *Id.* ¶ 2 (Akoum, J., dissenting).

59. According to article 2 to the Statute of the Special Tribunal for Lebanon, the provisions of the Lebanese Criminal Code are applicable to the prosecution and punishment of the crimes referred to in article 1. Statute of the Special Tribunal for Lebanon, art. 2, U.N. Doc S/RES/1757 (2007).

60. See GERHARD WERLE & FLORIAN JESSBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 28, ¶ 83 (3d ed. 2014) (noting that “[t]he hybrid courts’ jurisprudence, how-

### B. *The African Court of Justice and Human and Peoples' Rights*

In 2014, the African Union adopted a "Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights," which adds an international criminal law section to the African Court of Justice and Human and Peoples' Rights.<sup>61</sup> Article 46C(1) of the Protocol explicitly states that "[f]or the purpose of this Statute, the [African] Court shall have jurisdiction over legal persons, with the exception of States."<sup>62</sup> The Protocol then goes into further detail about corporate intention, attribution, and corporate knowledge.<sup>63</sup>

Also notable in this context is the list of crimes under the jurisdiction of the court, which includes, in addition to "traditional" international crimes such as crimes against humanity, the crime of "Trafficking in Hazardous Wastes"<sup>64</sup> and the crime of "Illicit Exploitation of Natural Resources."<sup>65</sup>

It should be noted that the Protocol has not yet entered into force.<sup>66</sup> Additionally, while this Protocol undoubtedly represents a trend toward corporate criminal responsibility in the international sphere, its implications with regard to the ICC are limited, due to the lack of an equivalent provision in the Rome Statute.

### C. *The International Law Commission's Draft Articles on Crimes Against Humanity*

In its sixty-eighth session (2016),<sup>67</sup> the Drafting Committee of the International Law Commission ("ILC") provisionally adopted draft articles 5 through 10 on crimes against humanity.<sup>68</sup> Draft article 5(7) states that

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ever, is in most cases much less relevant for the evolution of international criminal law than that of the United Nations ad hoc Tribunals").

61. African Union, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (June 27, 2014), [https://au.int/sites/default/files/treaties/36398-treaty-0045\\_-\\_protocol\\_on\\_amendments\\_to\\_the\\_protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights\\_e.pdf](https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf).

62. *Id.* art. 46C(1).

63. For instance, article 46C(2) states that "[c]orporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence." *Id.* art. 46C(2). According to article 46C(3), "[a] policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation." *Id.* art. 46C(3). And article 46C(4) states that "[c]orporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation." *Id.* art. 46C(4).

64. *Id.* art. 28A(12).

65. *Id.* art. 28A(13).

66. *Id.* art. 11 ("The Protocol and the Statute annexed to it shall enter into force thirty (30) days after the deposit of instruments of ratification by fifteen (15) Member States.") This condition has not yet been fulfilled.

67. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Eighth Session, U.N. Doc. A/71/10 (2016) (at its 3312th and 3325th meetings, on 9 June and 21 July 2016 respectively).

68. *Id.* at 246–77.

[s]ubject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.<sup>69</sup>

By provisionally adopting this draft article, the ILC clarified that private corporations may be prosecuted for crimes against humanity. Still, according to the ILC itself, the liability of legal persons at the national level may take different forms, and not necessarily a criminal one. The ILC emphasized that “there is no obligation to establish criminal liability if doing so is inconsistent with a State’s national legal principles; in those cases, a form of civil or administrative liability may be used as an alternative.”<sup>70</sup> Hence, while this is certainly a step forward with regard to international corporate liability in general, it has limited implications with regard to corporate *criminal* liability.

#### D. *Interim Conclusions*

In summary, there is indisputably a trend towards the recognition of corporate liability. Though this trend is more evident at the national level,<sup>71</sup> the developments described above may indicate a similar movement in the international sphere. In any event, it is probably too early to predict whether this trend will manifest itself in criminal responsibility or in other forms of liability.

Additionally, it should be emphasized that even if corporate criminal liability may be considered a general principle in international law, as the majority in the *STL Contempt* decision believed, the explicit language of article 25(1) constitutes a major hurdle with regard to prosecuting corporations before the ICC. As opposed to the examples discussed above—the STL Rules of Procedure and Evidence, the amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, and the ILC’s draft article on crimes against humanity—the text of article 25(1) to the Rome Statute explicitly applies only to natural persons. Perhaps, then, the only way for the Rome Statute to apply to legal entities is through an amendment to the Statute adding a provision dealing with jurisdiction over legal

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69. *Id.* at 248. The same text was adopted by the ILC in its sixty-ninth session (on May 26, 2017). Int’l Law Comm’n, Rep. on the Work of Its Sixty-Ninth Session: Crimes Against Humanity, U.N. Doc. A/CN.4/L.892 (2017).

70. *See id.* at 262–65 (describing the current state of liability for legal persons in international law).

71. *See supra* notes 10–12 and accompanying text.

entities. However, this may prove to be “extremely difficult to achieve diplomatically.”<sup>72</sup>

It is important to note, though, that the Rome Statute’s current treatment of legal persons does not avoid liability for corporate actions. The Court may hold individual perpetrators accountable for the crimes they have committed, without allowing a legal entity to shield them. As stated in the Nuremberg trials, “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>73</sup> Therefore, regardless of whether legal entities are subject to the Court’s jurisdiction, corporate managers and executives fall within the jurisdiction of the Court, and may be prosecuted as “natural persons.”

In this context, it should be noted that both OTP regulation 34(1) and the OTP’s 2016 Policy Paper direct the Office to conduct its investigations in a way that ensures that charges are brought against “the person or persons who appear to be the most responsible.”<sup>74</sup> It is not clear, however, who is “the most responsible” in the context of corporate crimes: Is it the corporation itself, or perhaps the corporate officials allegedly involved in the corporate actions?<sup>75</sup>

As Caroline Kaeb has noted, “attributing liability merely to the individual managers would not be an accurate reflection of blameworthiness when dealing with crimes committed through collective corporate action” and “mere individual criminal prosecution would not lead to the organizational change necessary at the firm level to reform corporate policies and structures that have facilitated the commitment of the crimes in the first place.”<sup>76</sup> From this perspective, in order to make the necessary impact at the firm level, as well as hold the individual accountable, perhaps both the corporation and corporate officials should be prosecuted.

In conclusion, it seems that there are substantial hurdles to prosecution of corporations under the Rome Statute, as the current language of article 25(1) does not readily allow such interpretation. This does not mean, of course, that corporations cannot be prosecuted at the national level. And, in

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72. David Scheffer, *Corporate Liability Under the Rome Statute*, 57 HARV. INT’L L. J. 37, 38 (2016, Online Symposium) (claiming that states that economically rely on the activity of multinational corporations would oppose such efforts).

73. United States et al. v. Goring et al., Judgment, Trial of the Major War Criminals Before the International Military Tribunal—Official Documents, at 223 (Nuremberg, 1947).

74. Regulations of the Office of the Prosecutor, ICC-BD/05-01-09 (Apr. 23, 2009). Regulation 34 (1) is also mentioned in the OTP Policy Paper, *supra* note 1, ¶ 42.

75. It should be noted that “most responsible” may be read as a relative term, that is, most responsible among those subject to the jurisdiction of the Court.

76. Caroline Kaeb, *A New Penalty Structure for Corporate Involvement in Atrocity Crimes: About Prosecutors and Monitors*, 57 HARV. INT’L L.J. 20, 21 (2016, online symposium) (also mentioning that “[t]he literature on organizational behavior has established that optimal deterrence and retribution can be achieved by targeting both the responsible individual and the firm . . .”).

any event, as mentioned above, corporate officials may be prosecuted as “natural persons.”

The article will now consider the applicability of the different Rome Statute crimes to the alleged conduct of the fossil fuel companies, focusing on war crimes, crimes against humanity, and genocide.

#### IV. CAN CLIMATE CRIMES BE CATEGORIZED WITHIN ANY OF THE ROME STATUTE’S CORE CRIMES?

##### A. *Climate Crimes as War Crimes*

As the name of this category of crimes implies, the existence of an armed conflict is an essential element for the prosecution of war crimes.<sup>77</sup> Thus, crimes committed in times of peace do not fall within the scope of this category of crimes.<sup>78</sup> Accordingly, only environmental crimes that “took place in the context of and [were] associated with an . . . armed conflict”<sup>79</sup> may constitute a crime under article 8 of the Rome Statute. Whereas environmental destruction is in many cases an integral part of crimes committed in the context of an armed conflict,<sup>80</sup> it may be reasonably assumed that climate crimes are generally not associated with an armed conflict, thus making this category of crimes of less relevance to the current discussion.

Still, it should be noted that when article 8 applies, several provisions of this article pertain to the destruction of property or damage to the natural environment. Article 8(2)(b)(iv) criminalizes the act of “[i]ntentionally launching an attack in the knowledge that such attack will cause . . . widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”<sup>81</sup> This definition was inspired by the 1977 Protocol I Additional to the 1949 Geneva Conventions (“Additional Protocol I”), articles 35(3) and 55(1).<sup>82</sup> Article I(1) to the Convention on the Prohibi-

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77. See SCHABAS COMMENTARY, *supra* note 38, at 228.

78. *Id.*

79. International Criminal Court, ICC-PIDS-LT-03-002/11, Elements of Crimes art. 8, (2011) (on war crimes) [hereinafter ICC Elements of Crimes].

80. See Int’l Law Comm’n, Report of the Int’l Law Comm’n on the Work of Its Seventy-First Session: Protection of the Environment in Relation to Armed Conflicts, Text and Titles of the Draft Principles Provisionally Adopted by the Drafting Committee on First Reading, U.N. Doc. A/CN.4/L.937 (Apr. 29–June 7 and July 8–Aug. 9 2019).

81. See Rome Statute, *supra* note 2, art. 8(2)(b)(iv).

82. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; TRIFFTERER COMMENTARY, *supra* note 40, at 378–79.



tion of Military or Any Other Hostile Use of Environmental Modification Techniques (the “ENMOD Convention”) uses similar language.<sup>83</sup>

Consequently, commentary on those documents may provide insight into the application of article 8(2)(b)(iv). In the context of the ENMOD Convention, the International Committee of the Red Cross (“ICRC”) interprets the term “widespread” as “encompassing an area on the scale of several hundred square kilometers;”<sup>84</sup> “long-lasting” shall be interpreted as “lasting for a period of months, or approximately a season;”<sup>85</sup> and “severe” shall be interpreted as “involving serious or significant disruption or harm to human life, natural and economic resources or other assets.”<sup>86</sup> A similar interpretation was suggested by the United Nations Environment Programme (“UNEP”).<sup>87</sup> In contrast, Additional Protocol I’s use of “long-lasting” is commonly understood as referring to a period of decades.<sup>88</sup> Climate crimes easily satisfy these three requirements since climate impacts are undoubtedly widespread, long-term, and severe, even under the stricter interpretation.

Notably, however, neither the Additional Protocol I, nor the ENMOD Convention, includes a proportionality test like that in article 8(2)(b)(iv) of the Rome Statute, requiring the damage to be “clearly excessive in relation to the concrete and direct overall military advantage anticipated.”<sup>89</sup>

In two separate provisions (article 8(2)(b)(ix) for international armed conflict, and its mirror provision for non-international armed conflict, article 8(2)(e)(iv)), article 8 of the Rome Statute also criminalizes the act of “[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not

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83. See Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Technique art 1.1, Dec. 10 1976, 1108 U.N.T.S. 151 [hereinafter ENMOD Convention].

84. CUSTOMARY IHL DATABASE, INT’L COMM. RED CROSS, *Practice Relating to Rule 45, Causing Serious Damage to the Natural Environment*, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule45](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule45) (last visited Apr. 24, 2020) (regarding the ENMOD Convention); TRIFFTERER COMMENTARY, *supra* note 40, at 378–79; David Hunter, *Private Sector Liability for Environmental Harm Under International Law, Background Paper Prepared for the International Commission of Jurists’ Expert Legal Panel on Corporate Complicity in International Crimes*, at 33 (prepared for the International Commission of Jurists’ Expert Legal Panel on Corporate Complicity in International Crimes) (on file with author).

85. CUSTOMARY IHL DATABASE, *supra* note 84.

86. *Id.*

87. U.N. ENV’T PROGRAMME, *Protecting the Environment During Armed Conflict: An Inventory and Analysis* 5 (Nov. 2009) (stating that “[a]s a starting point in developing these definitions, the precedents set by the 1976 ENMOD convention should serve as the minimum basis, namely that ‘widespread’ encompasses an area on the scale of several hundred square kilometers; ‘longterm’ is for a period of months, or approximately a season; and ‘severe’ involves serious or significant disruption or harm to human life, natural economic resources or other assets”).

88. See TRIFFTERER COMMENTARY, *supra* note 40, at 379.

89. ICC Elements of Crimes, *supra* note 79, art. 8(2)(b)(iv) n.36.

military objectives.”<sup>90</sup> Article 8(2)(e)(iv) was at the center of the *Al Mahdi* case, which will be discussed next.

### 1. The *Al Mahdi* Case

In this case, the defendant, Mr. Ahmad Al Faqi Al Mahdi, was charged with the crime of intentionally directing attacks against nine mausoleums and one mosque in Timbuktu, Mali in 2012.<sup>91</sup> He admitted guilt for the war crime of attacking protected objects under article 8(2)(e)(iv) of the Rome Statute<sup>92</sup> and was convicted as a co-perpetrator under articles 8(2)(e)(iv) and 25(3)(a) of the Rome Statute. Consequently, he was sentenced to nine years of imprisonment.<sup>93</sup>

In its decision, the ICC’s Trial Chamber VIII traced back the enhanced protection of cultural property in international law to articles 27 and 56 of the 1907 Hague Regulations, the 1919 Commission on Responsibility, and the Geneva Conventions.<sup>94</sup> Reflecting the particular importance of international cultural heritage, the Court stated that “the element of ‘direct[ing] an attack’ encompasses any acts of violence against protected objects and will not make a distinction as to whether it was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group.”<sup>95</sup> The Court further stressed that “international humanitarian law protects cultural objects as such from crimes committed both in battle and out of it.”<sup>96</sup>

While assessing the gravity of the crime, the Court noted that “even if inherently grave, crimes against property are generally of lesser gravity than crimes against persons.”<sup>97</sup> Still, considering the fact that the targeted build-

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90. Rome Statute, *supra* note 2, arts. 8(2)(b)(ix), 8(2)(e)(iv).

91. Prosecutor v. Al Mahdi, Judgment and Sentence, ¶ 10.

92. See *Al Mahdi Case: Accused Makes an Admission of Guilt at Trial Opening*, INT’L CRIM. CT. (Aug. 22, 2016), <https://www.icc-cpi.int/pages/item.aspx?name=pr1236>. Interestingly enough, this was the first time in the history of the Court that a defendant has made an admission of guilt.

93. Prosecutor v. Al Mahdi, Judgment and Sentence, ¶ 109.

94. *Id.* ¶ 14. The Court also referred to the Additional Protocol I, *supra* note 82, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609 and to the Second Protocol to The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, March 26, 1999, 2253 U.N.T.S. 172.

95. *Id.* ¶ 15.

96. *Id.*

97. *Id.* ¶ 77; see also Prosecutor v. Germain Katanga, ICC-01/04-01/07-3484-tENG, Decision on Sentence Pursuant to Article 76 of the Statute, ¶ 145 (May 23, 2014), [https://www.icc-cpi.int/CourtRecords/CR2016\\_04476.pdf](https://www.icc-cpi.int/CourtRecords/CR2016_04476.pdf) (distinguishing between “the crimes of murder and attack against a civilian population on the one hand, and the crimes of destruction and pillaging, on the other, as the former amount to violence to life whereas the latter, although significant, amount to threat to property” and expressing the view that there should be a more severe penalty for the former). The Chamber also emphasized that since the

ings had not only religious, but also symbolic and emotional value, for the inhabitants of Timbuktu, the Court concluded that the crime was “of significant gravity.”<sup>98</sup> The Court also took into account the fact that all but one of the targeted sites were United Nations Educational, Scientific and Cultural Organization (“UNESCO”) World Heritage sites and, as such, the attacks had particular gravity as their destruction affected not just the inhabitants of Timbuktu, but the entire international community.<sup>99</sup>

## 2. Interim Conclusions

In sum, the category of war crimes could be relevant to the prosecution of environmental crimes that were committed with connection to an armed conflict. Under article 8, environmental crimes may be prosecuted as war crimes either alongside other war crimes, or as the sole crime prosecuted, as was demonstrated in the *Al Mahdi* case, where cultural damage alone was litigated. Notably, in this case the armed conflict did not play a central role in the decision. The *Al Mahdi* Court explicitly stated that “the [qualifying] ‘conduct’ is the attack on cultural objects,” and that “what this element requires is not a link to any particular hostilities but only an association with the non-international armed conflict more generally,”<sup>100</sup> suggesting that the nexus to an armed conflict in article 8 environmental cases could also be somewhat flexible. Under the *Al Mahdi* Court’s logic, the qualifying conduct would be environmental destruction, and a general link to an armed conflict would be sufficient to create a nexus. Nevertheless, an association to an armed conflict cannot be waived altogether, making article 8 an inept option for the prosecution of most climate crimes.

Still, the *Al Mahdi* decision is relevant because it illustrates the significance the ICC attributes to crimes that were not committed directly against people, but that, nevertheless, have a great effect on them and on the com-

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property that was destroyed was essential for the daily lives of the victims, the destruction had led to their poverty and forced them to leave their homes. *Id.*

98. Prosecutor v. Al Mahdi, Judgment and Sentence, ¶ 82.

99. *Id.* ¶¶ 78–80. It is interesting to mention that according to an International Union for the Conservation of Nature (“IUCN”) report, “climate change is the fastest growing threat to natural World Heritage known to affect world heritage sites.” *IUCN World Heritage Outlook 2: A Conservation Assessment of All Natural World Heritage Sites*, IUCN (Nov. 2017), <https://www.worldheritageoutlook.iucn.org/home-page>. For a discussion of the potential impacts of climate change on World Heritage sites see also UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, *Climate Change and World Heritage: Report on Predicting and Managing the Impacts of Climate Change on World Heritage and Strategy to Assist States Parties to Implement Appropriate Management Responses* (May 2007), <https://whc.unesco.org/document/8874>. See also Jørgen Hollesen et al., *Climate Change and the Deteriorating Archaeological and Environmental Archives of the Arctic*, 92 *ANTIQUITY* 363, 573–86 (2018); (showing that intensification of permafrost thaw and coastal erosion are damaging and destroying a wide range of cultural and environmental archives around the Arctic).

100. Prosecutor v. Al Mahdi, Judgment and Sentence, ¶ 18.

mon interest of all humanity.<sup>101</sup> The willingness of the Court to convict Al Mahdi under these circumstances may serve as a signal of its potential openness towards prosecuting environmental crimes,<sup>102</sup> and it also might be used as an interpretive tool with regard to the prosecution of climate crimes under other categories of crimes listed in the Rome Statute.

### B. *Climate Crimes as Crimes Against Humanity*

“Crimes against humanity” were first introduced as legally binding in 1945, when Professor Hersch Lauterpacht proposed the crime for prosecution before the Nuremberg Tribunal, to address atrocities against civilians. However, the term “crimes against humanity” was coined before that and was in common use before 1945 “to describe a range of atrocities, including slavery and the slave trade, as far back as the eighteenth century, including by eminent thinkers like Voltaire and Beccaria.”<sup>103</sup> It was also used in 1915, in a non-binding, joint declaration made by the French, British, and Russian governments, in the context of mass killings of Armenians in the Ottoman Empire.<sup>104</sup>

The creation of this category of crimes “indicated that the international community was widening the category of acts considered of ‘meta-national’ concern. This category came to include all actions running contrary to those basic values that are, or should be, considered inherent in any human being.”<sup>105</sup> It also “affirmed that international law was not only ‘between States’ but ‘also the law of mankind.’”<sup>106</sup>

Unlike war crimes, crimes against humanity under the Rome Statute include no requirement for a nexus to an armed conflict.<sup>107</sup> Article 6(c) of the

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101. See also OTP POLICY PAPER, *supra* note 1, ¶ 46.

102. See also *id.*

103. See SCHABAS COMMENTARY, *supra* note 38, at 147.

104. See ANTONIO CASSESE & PAOLA GAETA, CASSESE’S INTERNATIONAL CRIMINAL LAW 84 (3d ed. 2013). The declaration stated that: “In view of these new crimes of Turkey against humanity and civilization, the Allied governments announce publicly to the Sublime Porte that they will hold personally responsible [for] these crimes all members of the Ottoman Government and those of their agents who are implicated in such massacres.” *Id.*; see also SANDS, *supra* note 13, at 111–13.

105. CASSESE & GAETA, *supra* note 104, at 87.

106. SANDS, *supra* note 13, at 113. Interestingly enough, it has been said that the term “humanity” in “crimes against humanity” was not synonymous with “mankind” or “human race,” but rather referred to “the quality of being humane.” CASSESE & GAETA, *supra* note 104, at 87. This may indicate that it is not necessary to show that human beings were harmed as a result of the act, possibly supporting the recognition of crimes against the environment *per se* (such as harm to nature, harm to animals, and biodiversity loss) as crimes against “humanity.” However, in the case of the alleged climate crimes discussed here, this argument is obviously of less relevance since humans are direct victims of climate change.

107. As opposed to war crimes, which derive from international humanitarian law, this category of crimes is viewed as an implication of international human rights law. See SCHABAS COMMENTARY, *supra* note 38, at 147; CASSESE & GAETA, *supra* note 104, at 92.

Charter of the Nuremberg Tribunal has linked crimes against humanity to the other two categories of offences, crimes against peace and war crimes,<sup>108</sup> and the Nuremberg Tribunal narrowed the scope of this category of offences by excluding crimes against humanity that had been committed before the war.<sup>109</sup> However, “[i]n the years following World War II, the validity of the war nexus was . . . increasingly questioned,”<sup>110</sup> and today international customary law prohibits crimes against humanity regardless of whether they were committed in times of war or in times of peace.<sup>111</sup> This principle is well reflected in the Rome Statute, which does not require that crimes against humanity have any connection to an armed conflict,<sup>112</sup> leaving the door open to the possibility of classifying climate crimes as crimes against humanity.

### 1. The Contextual Elements of Crimes Against Humanity

The ICC has identified five distinct “contextual elements” of the crimes listed in article 7 of the Rome Statute:<sup>113</sup> (i) an attack directed against any civilian population; (ii) a state or organizational policy; (iii) an attack of a widespread or systematic nature; (iv) a nexus between the individual act and the attack; and (v) the perpetrator’s knowledge of the attack. How these elements apply to the alleged climate crimes is explored below.

#### i. An Attack Directed Against Any Civilian Population

This element reflects the great innovation made by the Nuremberg Charter—that individuals could be prosecuted for crimes committed in their official capacity against their own citizens.<sup>114</sup> As clarified by the *Elements of Crimes*, for the purposes of article 7(1) of the Rome Statute, an “attack” is not restricted to a “military attack,” but rather refers to “a campaign or oper-

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108. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal art. 6(c), Aug. 8, 1945, 58 Stat. 1533, 82 U.N.T.S. 279 (“[I]n execution of or connection with any crime within the jurisdiction of the Tribunal[.]”); see CASSESE & GAETA, *supra* note 104, at 86.

109. See CASSESE & GAETA, *supra* note 104, at 87–88. Although this might have been due to issues of retroactivity. *Id.*

110. See Marjolein Cupido, *The Policy Underlying Crimes Against Humanity: Practical Reflections on a Theoretical Debate*, 22 CRIM. L.F. (2011), at 278.

111. Nevertheless, it may be argued that other international instruments narrow the scope of the customary rules, such as the Statute of the ICTY, which refers to crimes against humanity committed in an armed conflict. See CASSESE & GAETA, *supra* note 104, at 90; Statute of the International Tribunal for the Former Yugoslavia Res. 827 art. 5 (May 25, 1993) (amended July 7, 2009 by Res. 1877).

112. CASSESE & GAETA, *supra* note 104, at 90.

113. Situation in the Republic of Kenya, ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation, ¶ 79 (Mar. 31 2010); see also SCHABAS COMMENTARY, *supra* note 38, at 153.

114. SCHABAS COMMENTARY, *supra* note 38, at 154.

ation carried out against the civilian population.”<sup>115</sup> It should also be noted that an “attack” may be non-violent.<sup>116</sup> An “attack” consists of “a course of conduct involving the commission of multiple acts referred to in paragraph 1.”<sup>117</sup> The phrase “course of conduct” has been interpreted by the Court to indicate “a systemic . . . series or overall flow of events as opposed to a mere aggregate of random acts.”<sup>118</sup>

The object of an attack may be civilian victims of any nationality, ethnicity, or may have other distinguishing features. While it is not required that the entire civilian population of a given geographical area be targeted, the civilian population must be the primary object of the attack and cannot merely be an incidental victim of the attack.<sup>119</sup>

Given the broad interpretation adopted in the jurisprudence of the Court with regard to this requirement, it may be possible to classify the alleged conduct of the fossil fuel industry as an “attack.” The documents and findings mentioned in Part II indicate that the alleged conduct involved “the multiple commission of acts,” and it constitutes “a series or overall flow of events.” The fact that the attack may be non-violent also supports this notion.

As for the “direction” of the attack, it may be claimed that the fossil fuel companies (or their officials) did not “direct” an attack against a civilian population. Yet, the conduct studies show that although the fossil fuel companies allegedly knew that their actions were likely to produce severe environmental consequences, they nevertheless did not alter their conduct in light of that knowledge. Arguably, this alleged conduct should be viewed as equivalent to “directing” an attack on a civilian population.<sup>120</sup>

In this context, it is perhaps useful to analogize to the principle of proportionality, discussed above in the context of article 8(2)(b)(iv) of the Rome Statute. The principle is manifested, *inter alia*, in article 57(2)(a)(iii) of Additional Protocol I which reads:

an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a

115. ICC Elements of Crimes, *supra* note 79, art. 7, introduction, ¶ 3 (“The acts need not constitute a military attack.”).

116. See SCHABAS COMMENTARY, *supra* note 38, at 155.

117. Situation in the Republic of Kenya, Decision, ¶ 80 (as provided for in article 7(2)(a) of the Rome Statute).

118. Prosecutor v. Gbagbo, ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, ¶ 209 (June 12, 2014).

119. Prosecutor v. Gombo, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶¶ 75–76 (June 15, 2009); Situation in the Republic of Kenya, Decision, ¶ 82.

120. The question of the required *mens rea* that derives from this assertion will be discussed below.

combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>121</sup>

Indeed, international humanitarian law and international criminal law consider inflicting collateral damage that is excessive in relation to the anticipated military advantage to be a grave breach of Additional Protocol I<sup>122</sup> and as a war crime respectively.<sup>123</sup> The principle of proportionality is also manifested in the interpretation given to article 6 of the International Covenant on Civil and Political Rights (“ICCPR”) (the right to life). According to the Human Rights Committee’s General Comment 36 on article 6 of the ICCPR, “indiscriminate attacks, [and] failure to apply the principles of precaution and proportionality . . . would also violate [the right to life in] article 6 of the Covenant.”<sup>124</sup>

To pull the analogy full circle, in the context of the alleged climate crimes, fossil fuel companies’ desire to make maximum profit may be considered as the equivalent of a drive for “military advantage,” and the severe and irreversible impacts of climate change may be the equivalent of “collateral damage” expected to occur. Thus, though the concept of proportionality does not directly apply to peacetime conduct, this analogy may support the notion that, to prove an attack was “directed,” it is sufficient to show that the perpetrator knew about the potential consequences of his or her action on the civilian population, and nevertheless continued that action.<sup>125</sup> Therefore, when corporations (or corporate executives) engage in an activity that is expected to cause severe and irreversible “collateral damage”—such as the effects of climate change—they may be found to have “directed” an attack against a civilian population.

## ii. A State or Organizational Policy

This contextual element requires the attacks against any civilian population to have been committed “pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>126</sup> The *Elements of Crimes* offer further clarification, stating that “[i]t is understood that [the term] ‘policy to commit such an attack’ requires that the State or organization actively pro-

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121. Additional Protocol I, *supra* note 82, art. 57(2)(a)(iii).

122. *See id.*, art. 85(3)(b).

123. *See Rome Statute, supra* note 2, art. 8(2)(b)(iv).

124. Human Rights Committee, General Comment 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life art. 64, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018) [hereinafter General Comment 36]; *see also id.* art. 66 (stressing that “[t]he threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale is incompatible with respect for the right to life and may amount to a crime under international law”).

125. This notion also pertains to the mental element required, as will be discussed below.

126. *See Rome Statute, supra* note 2, art. 7(2)(a).

mote or encourage such an attack against a civilian population.”<sup>127</sup> It should be emphasized that a “policy” may, in exceptional circumstances, be implemented by a deliberate failure to take action that is consciously aimed at encouraging such attack.<sup>128</sup>

The terms “policy” and “State or organizational”—which are not defined in the Statute—were interpreted by the Court as requirements aimed at

ensur[ing] that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public or private resources. Such a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be explicitly defined by the organisational group. Indeed, an attack which is planned, directed or organised—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion.<sup>129</sup>

The conduct studies in Part II suggest that the fossil fuel companies allegedly acted in accordance with a carefully planned and organized policy, intended to undermine the public understanding of scientific research, promote climate change denial, and use science and public skepticism to prevent environmental regulation. The conduct studies and findings also showed that these fossil fuel companies’ actions were allegedly conducted, *inter alia*, by the “Smoke and Fumes Committee”—a group created specifically for this purpose.

A key question pertaining to the “organizational” requirement is whether it requires the involvement of a state-like organization. In this sense, the policy requirement “is essential for distinguishing international crimes from ‘ordinary’ domestic criminality,”<sup>130</sup> and “functions as a safeguard [so] that the ICC does not deal with sporadic instances of large-scale violence.”<sup>131</sup> In the *Kenya* decision, the Court stressed that “the formal nature of a group and the level of its organization should not be the defining criterion” but rather “a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values.”<sup>132</sup> The Court determined

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127. ICC Elements of Crimes, *supra* note 79, art. 7, introduction, ¶ 3; *cf.* Cupido, *supra* note 110, (arguing that it is not clear whether the policy requirement is an autonomous element of crime or a factual circumstance).

128. *Id.* art. 7, introduction, ¶ 3 n.6.

129. Situation in the Republic of Kenya, Decision, ¶ 84; Prosecutor v. Katanga, ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 396 (Oct. 14, 2008).

130. See Cupido, *supra* note 110.

131. Thomas Obel Hansen, *The Policy Requirement in Crimes Against Humanity: Lessons from and for the Case of Kenya*, 43 GEO. WASH. INT’L L. REV. 1, 39 (2011).

132. Situation in the Republic of Kenya, Decision, ¶ 90.



that “organizations not linked to a State may, for the purposes of the Statute, elaborate and carry out a policy to commit an attack against a civilian population.”<sup>133</sup> It was also stated that

the determination of whether a given group qualifies as an organization under the Statute must be made on a case-by-case basis. In making this determination, the Chamber may take into account a number of considerations, *inter alia*: (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.<sup>134</sup>

The Court emphasized, though, that these considerations “do not constitute a rigid legal definition, and do not need to be exhaustively fulfilled.”<sup>135</sup> Accordingly, a private entity, such as a multinational fossil fuel corporation, may qualify as an “organization” under the Statute.

It should be noted that in a dissenting opinion to the *Kenya* decision, Judge Kaul expressed a more restrictive interpretive approach with regard to the “organizational” requirement:<sup>136</sup> An “organization” may be a private entity (a non-state actor, and not an organ of a state or acting on behalf of a state), however, “organizations” should still “partake of some characteristics of a State” such as:

(a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale.<sup>137</sup>

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133. *Id.* ¶ 92.

134. *Id.* ¶ 93.

135. *Id.*

136. *Id.* ¶¶ 38–40 (Kaul, J., dissenting). Judge Kaul compared the English text of the Statute to other languages (French, Spanish, and Arabic), and concluded that whereas according to the English text, the “policy” needs only to be “organizational,” the text in other languages clearly refers to the requirement that a policy be adopted by an “organization,” “which established or at least endorsed a policy to commit such an attack.”

137. *Id.* ¶ 51.

These criteria, according to the dissent, are meant to distinguish an “organization” from “groups of organized crime, a mob, groups of (armed) civilians or criminal gangs.”<sup>138</sup> Additionally, “‘organizational policy’ must be established at the policymaking level of the ‘organization.’”<sup>139</sup>

Judge Kaul also warned against expanding the concept of crimes against humanity to any infringement of human rights, as well as against the “banalization” or “trivialization” of the crimes listed in the Statute,<sup>140</sup> due to the fact that “the ICC serves as a beacon of justice intervening in limited cases where the most serious crimes of concern to the international community as a whole have been committed.”<sup>141</sup>

Yet even under the dissent’s strict interpretation, a private entity such as a multinational fossil fuel corporation may be recognized as an “organization.” Indeed, though multinational corporations do not “exercise control over part of the territory of a State,” they clearly are “a collectivity of persons” that were “established and act for a common purpose . . . over a prolonged period of time.” They have “adopted a certain degree of hierarchical structure including . . . some kind of policy level” and have the “capacity to impose the policy on [their] members and to sanction them.” They also have “the capacity and means available to attack any civilian population on a large scale” (in the non-violent sense of “attack”), as well as “the means and resources available to reach the gravity of systemic injustice in which parts of the civilian population find themselves.”<sup>142</sup>

As presented in the CIEL Smoke and Fume Report, “the petroleum industry has long been highly coordinated, acting through centralized industry associations.”<sup>143</sup> The Committee on Smoke and Fumes was allegedly established to fund research into the causes of air pollution and “to actively communicate with ‘interested organizations in industry, research, government, and the public,’” in order “to avoid ‘the hasty passage of a law or laws for the control of a given air pollution situation.’”<sup>144</sup> These findings demonstrate that fossil fuel companies may qualify as organizations for the purposes of their prosecution for crimes against humanity.

Indeed, in opposing the recognition of a private entity as an organization in the context of article 7 of the Rome Statute, Judge Kaul’s dissenting opinion in the *Kenya* decision resorted to a “slippery slope” argument, warning against the “banalization” of this category of crimes. However, given the severity of the climate crisis, which is viewed as a “common con-

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138. Situation in the Republic of Kenya, Decision, ¶ 55; *see also* 1 M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS AND INTEGRATED TEXT, 151–52 (2005).

139. *Id.* ¶ 68.

140. Situation in the Republic of Kenya, Decision, ¶ 55 (Kaul, J., dissenting).

141. *Id.* ¶ 65.

142. *Id.* ¶ 66.

143. CIEL, SMOKE AND FUMES REPORT, *supra* note 28, at 8.

144. CIEL, SMOKE AND FUMES REPORT, *supra* note 28, at 9.

cern of humankind,”<sup>145</sup> and considering the alleged conduct of the fossil fuel companies described above (and in particular the alleged decades-long, carefully planned campaign to mislead the public, shareholders, and policymakers), the fear of banalization does not appear to be relevant.

### iii. Widespread or Systematic Attack

This element requires that the act was “committed as part of a widespread or systematic attack.”<sup>146</sup> In the jurisprudence of the Court, these two conditions—widespread and systematic—have been interpreted as disjunctive, meaning that “the alleged acts must be *either* widespread *or* systematic to warrant classification as crimes against humanity.”<sup>147</sup> This requirement was said to be aimed at “exclud[ing] isolated or random acts from the notion of crimes against humanity.”<sup>148</sup> Broadly speaking, the Court has also stressed that “the adjective ‘widespread’ connotes the large-scale nature of the attack and the number of targeted persons, whereas the adjective ‘systematic’ refers to the organised nature of the acts of violence and the improbability of their random occurrence.”<sup>149</sup>

More specifically, the Court has interpreted the term “widespread” as requiring that the attack be “massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”<sup>150</sup> A widespread attack may be the “cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.”<sup>151</sup> Similarly, it may be either an attack “carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians.”<sup>152</sup>

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145. U.N. Framework Convention on Climate Change, Adoption of the Paris Agreement, U.N. Doc. FCCC/CP/2015/10/Add.1, decision 1/CP.21 (Jan. 29, 2016) [hereinafter Paris Agreement].

146. Rome Statute, *supra* note 2, art. 7(1).

147. Situation in the Republic of Kenya Decision, ¶¶ 94–95 (emphasis added); TRIFFTERER COMMENTARY, *supra* note 40, at 156. *But see* SCHABAS, COMMENTARY, *supra* note 38, at 165–66 (stressing that although it has been argued that these requirements—“widespread” and “systematic”—are cumulative, there is little practical significance to this approach since the two conditions tend to overlap).

148. Situation in the Republic of Kenya, Decision, ¶ 94; TRIFFTERER COMMENTARY, *supra* note 40, at 156 (noting that this was also the approach taken by the United Nations War Crimes Commission (“UNWCC”) “speaking of crimes ‘which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied . . . endangered the international community or shocked the conscience of mankind.’”).

149. Prosecutor v. Katanga, ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 394 (Oct. 14, 2008).

150. Situation in the Republic of Kenya, Decision, ¶ 95.

151. *Id.*

152. Prosecutor v. Gombo, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 83 (June 15, 2009).

As for the term “systematic,” it was interpreted as requiring that the acts of violence “be characterized as organized in nature and manifesting a pattern ‘in the sense of non-accidental repetition of similar criminal conduct on a regular basis.’”<sup>153</sup> For instance, an attack was considered “systematic” when it “lasted for over five years and the acts of violence of which it was comprised followed, to a considerable extent, a similar pattern.”<sup>154</sup>

On the face of it, the alleged conduct discussed in this article satisfies both requirements: The effects of climate change are experienced across the globe, by a large number of victims, including people, communities, and wildlife, and it will most probably have a profound effect on future generations. Climate impacts are known to be massive, frequent, and of a large-scale nature.<sup>155</sup> In light of these characteristics of climate change, it seems very likely that the attack at issue may be considered as “widespread.”

Due to the fact that these requirements—widespread and systematic—were interpreted as being disjunctive, there is no need to show a climate crimes attack is both “widespread” and “systematic.” Nonetheless, it seems that the alleged attack at issue is indeed “systematic.” The documents discussed in Part II (the conduct research and findings) suggest that the attack was carefully planned and carried out over decades, and that it was repeated and was not of a random nature. According to the CIEL Smoke and Fumes Report, the events described in the report “are not isolated incidents, but rather demonstrate a systemic, decades-long pattern of climate understanding, denial, and obstruction,”<sup>156</sup> and “the industry . . . engaged in ongoing and systematic efforts to convince the public that climate science was uncertain, climate risks were nonexistent or exaggerated, or that vital measures to reduce carbon emissions and promote cleaner energies were unwarranted or not feasible.”<sup>157</sup>

#### iv. A Nexus Between the Individual Act and the Attack

This element requires a link between the acts committed by the accused and the attack against the civilian population. For this purpose, “the Chamber must consider the nature, aims and consequences” of the act.<sup>158</sup> “[I]solated acts which clearly differ, in their nature, aims and consequences, from other acts forming part of an attack, would fall outside the scope of ar-

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153. *Id.*

154. *Id.*

155. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [“IPCC”], CLIMATE CHANGE 2014: SYNTHESIS REPORT (R.K. Pachauri & L.A. Meyer eds., 2014); IPCC, *Global Warming of 1.5 °C* (Oct. 6, 2018), <http://www.ipcc.ch/report/sr15>.

156. CIEL, SMOKE AND FUMES REPORT, *supra* note 28, at 18.

157. *Id.* at 19.

158. *See* Situation in the Republic of Kenya, Decision, ¶ 98.

article 7(1) of the Statute.”<sup>159</sup> Although it is not necessary to show that an act itself was widespread or systematic—even a single act may satisfy the requirements of article 7(1)—it is necessary to show that the act was committed in the broader context of the attack, “in terms of [its] characteristics, nature, aims, targets and alleged perpetrators, as well as times and location.”<sup>160</sup>

The documents discussed in Part II reveal a series of allegedly carefully planned acts, whose nature, aims, and consequences suggest that they were committed as part of the broader context of the alleged attack.

#### v. Knowledge of the Attack

Article 7 requires that the punishable act be committed not just with a nexus to, but “with knowledge of,” the widespread or systematic attack. The *Elements of Crime* clarify the requisite knowledge, for each punishable act, which exists when “the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”<sup>161</sup> The Court has interpreted this requirement as relating to the link between the individual punishable act committed by the accused and the broader attack, in the sense that it must be proven that the accused knew of the attack “in general terms,”<sup>162</sup> as well as of the fact that his or her acts would be part of it.<sup>163</sup> Nevertheless, there is no need for the Prosecutor to show that the accused had detailed knowledge pertaining to the entire attack, nor is it necessary to show that he or she had the precise details of the policy or plan of the state or organization.<sup>164</sup>

According to the Court’s jurisprudence, such knowledge

may be inferred from circumstantial evidence, such as: the accused’s position in the military hierarchy; his assuming an important role in the broader criminal campaign; his presence at the

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159. Situation in the Republic of Cote d’Ivoire, ICC-02/11-14-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation, ¶ 89 (Nov. 15, 2011); SCHABAS COMMENTARY, *supra* note 38, at 166–67.

160. Prosecutor v. Gbagbo, Decision, ¶ 209.

161. ICC Elements of Crimes, *supra* note 79.

162. See Prosecutor v. Gombo, Decision, ¶ 87 (June 15, 2009).

163. TRIFFTERER COMMENTARY, *supra* note 40, at 175–76; Prosecutor v. Gombo, Decision, ¶ 87. The ICTY Appeals Chamber has rejected the interpretation that “knowledge also includes the conduct ‘of a person taking a deliberate risk in the hope that the risk does not cause injury.’” Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Judgment, ¶¶ 126–28 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004); Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment ¶ 254 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); SCHABAS COMMENTARY, *supra* note 38, at 168.

164. In the *Elements of Crimes*, it is explicitly stated that the knowledge requirement “should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.” ICC Elements of Crimes, *supra* note 79; Prosecutor v. Al Bashir, Decision on the Prosecution’s Application for a Warrant of Arrest, ¶ 81.

scene of the crimes; his references to the superiority of his group over the enemy group; and the general historical and political environment in which the acts occurred.<sup>165</sup>

It may also be inferred from factors such as “the scope and gravity of the acts perpetrated, the nature of the crimes committed, and the degree of which they are common knowledge.”<sup>166</sup>

Notably, according to article 30(1)—which is the general *mens rea* requirement in the Rome Statute—it is necessary to show that “the material elements are committed with intent and knowledge.”<sup>167</sup> The relationship between the general requirement of article 30 and the knowledge requirement of article 7(1), is described in the *Gombo* decision: Article 7(1) “*is an aspect of the mental element under article 30(3) of the Statute.*”<sup>168</sup> A somewhat nuanced view is expressed in the Triffterer Commentary, stating that the knowledge requirement of article 7(1) “constitutes *an additional* mental element to be distinguished from the general *mens rea* requirement of article 30.”<sup>169</sup> Either way, under both approaches, it is necessary to prove the two different components of article 30—intent and knowledge—in order to establish criminal responsibility.

The main question in this respect pertains to the standard for intent under article 30 of the Statute. According to article 30, it is necessary to show that the accused “means to engage in the conduct”<sup>170</sup> and that he or she “means to cause the consequence or is aware that it will occur in the ordinary course of events.”<sup>171</sup> Additionally, it should be proven that the accused had “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”<sup>172</sup> The article 30 requirements apply to the different material elements of each crime in the Statute, but “[t]he exact scope of this application . . . has to be inferred for each crime depending on the specific material elements set out in the definition of the crime.”<sup>173</sup>

In the case of the alleged climate crimes, it may be assumed that fossil fuel companies (or their corporate officials) were not driven by an intention to cause damage to the environment, but rather by their aim to maximize profit, with environmental damage only a by-product of their conduct.<sup>174</sup>

165. Prosecutor v. Katanga, Decision, ¶ 402.

166. SCHABAS COMMENTARY, *supra* note 38, at 168; Prosecutor v. Blaškić, Judgment, ¶ 259.

167. Rome Statute, *supra* note 2, art. 30(1).

168. Prosecutor v. Gombo, Decision, ¶ 87 (emphasis added).

169. See TRIFFTERER COMMENTARY, *supra* note 40, at 176 (emphasis added).

170. Rome Statute, *supra* note 2, art. 30(2)(a).

171. *Id.* art. 30(2)(b).

172. *Id.* art. 30(3).

173. See TRIFFTERER COMMENTARY, *supra* note 40, at 1113.

174. Cf. Commentary of the ILC to Article 26, ¶ 6 (regarding the word “willfully” in article 26 of the ILC draft).

Nonetheless, the conduct studies suggest that these companies “have been aware of the risks of climate change, and their products’ role in exacerbating those risks, for at least six decades,”<sup>175</sup> and yet they have allegedly continued to peddle their products and use industry-funded research in order to increase public skepticism about climate change.<sup>176</sup>

Arguably, such conduct may qualify as equivalent to intent,<sup>177</sup> if the mental state of *dolus eventualis* falls within the scope of article 30 of the Statute. Under one common definition of *dolus eventualis*, a perpetrator acts with this mental state if he or she “foresees that his or her action is likely to produce its prohibited consequences, and nevertheless willingly takes the risk of so acting.”<sup>178</sup>

The question whether article 30 may be read to include *dolus eventualis* is quite controversial.”[T]he drafting history of the Rome Statute suggests that *dolus eventualis* was explicitly considered and rejected by the drafters of the Rome Statute, because doing so ‘might send the wrong signal that these forms of culpability were sufficient for criminal liability as a general rule.’”<sup>179</sup> This may support the idea that *dolus eventualis* does not fall within the scope of article 30. The ICC’s Pre-Trial Chamber in the *Gombo* decision adopted this approach, concluding that “such concepts [*dolus eventualis*, recklessness, or any lower form of culpability] are not captured by article 30 of the Statute. This conclusion is supported by the express language of the phrase ‘will occur in the ordinary course of events,’ which does not accommodate a lower standard than the one required by *dolus directus in the second degree* (oblique intention).”<sup>180</sup> Nevertheless, “commentators and some judges continue to maintain that *dolus eventualis* falls within the Rome Statute’s Article 30 default rule.”<sup>181</sup>

No doubt, the question of whether *dolus eventualis* falls within the scope of article 30 or not may be a crucial one with regard to the possibility of classifying the alleged climate crimes as crimes under the Rome Statute. Whereas the “knowledge” requirement of article 7 may be satisfied by the findings discussed in Part II, suggesting that the companies knew about the likely consequences of their conduct, the general “intent” requirement under article 30(1) poses a substantial bar. As mentioned above, it seems that the corporations did not intend to harm the environment, but rather to make

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175. See CIEL, SMOKE AND FUMES REPORT, *supra* note 28, at 1.

176. *Id.* at 21.

177. According to this approach, an action and its consequences may be viewed as “a package deal,” making “the distinction between intent and foresight . . . illusory.” See Jens D. Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT’L L. 79, 126 (2013).

178. *Id.* at 88.

179. *Id.* at 101.

180. See Prosecutor v. Gombo, Decision, ¶ 360 (emphasis in original); see also SCHABAS COMMENTARY, *supra* note 38, at 632.

181. Ohlin, *supra* note 177, at 103–10 (offering several arguments to support the inclusion of *dolus eventualis* in article 30).

maximum profit. Yet if a reduced mental state such as *dolus eventualis* satisfies article 30, the alleged climate crimes may nevertheless be prosecutable before the ICC.

The next part will examine the relevant punishable acts listed in this category of crimes.

## 2. Relevant Punishable Acts

The most relevant punishable acts listed after the chapeau of article 7 are probably “deportation or forcible transfer of population”<sup>182</sup> and the residual crime of “other inhumane acts.”<sup>183</sup> This section will examine their applicability to the alleged conduct of the oil and gas corporations, focusing on liability for the forced displacement of communities vulnerable to the adverse effects of climate change.<sup>184</sup>

### i. Deportation or Forcible Transfer of Population

Article 7(2)(d) of the Rome Statute defines “deportation or forcible transfer of population” as “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.” Arguably, since the effects of climate change are associated with migration, the alleged conduct of the fossil fuel companies may be considered “other coercive acts” causing forced displacement.

The *Elements of Crime* clarify that “[t]he term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.”<sup>185</sup> In a similar vein, the ICC Pre-Trial Chamber II has stated that “deportation or forcible transfer of population is an open-conduct crime”<sup>186</sup> and that “in order to establish that the crime of deportation or forcible transfer of population is consummated, the Prosecutor has to prove that one or more acts that the perpetrator has performed produced the effect to deport or forcibly transfer the victim.”<sup>187</sup>

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182. Rome Statute, *supra* note 2, art. 7(1)(d).

183. *Id.* art. 7(1)(k).

184. See IPCC, *IPCC Special Report on Climate Change and Land: Summary for Policymakers* (Aug. 2019), at A.5.7 (stating that “[c]hanges in climate can amplify environmentally induced migration both within countries and across borders”); Anouch Missirian & Wolfram Schlenker, *Asylum Applications Respond to Temperature Fluctuations*, 358 SCI. 1610–14 (Dec. 2017) (suggesting that climate change will drive a huge increase in the number of migrants seeking asylum in Europe if current trends continue); ANA NÚÑEZ, CIEL, *THE INUIT CASE STUDY* (2007), [http://www.ciel.org/Publications/Inuit\\_CaseStudy\\_Sep07.pdf](http://www.ciel.org/Publications/Inuit_CaseStudy_Sep07.pdf).

185. See ICC *Elements of Crimes*, *supra* note 79, art. 7(1)(d) n.12.

186. Prosecutor v. Ruto, ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) to the Rome Statute, ¶¶ 244–45 (Jan. 23, 2012).

187. *Id.*



Therefore, in order to establish that fossil fuel companies have committed the crime of deportation or forcible transfer of population, the Prosecutor will need to prove that their alleged conduct has “produced the effect” of forced displacement.

According to this interpretation, and given that the prohibition is aimed at “safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference,”<sup>188</sup> the acts allegedly committed by the fossil fuel companies may be found to have produced the effect of forcible displacement.

True, there is a considerable gap between the alleged conduct and this outcome because it may take years, or even decades, for climate change to cause forced displacement, and not only is migration the last link in a long chain of climate effects, but it is also driven by a multitude of factors. These characteristics may constitute a major difficulty with regard to the plausibility of classifying the alleged climate crimes as crimes of forcible displacement (and may also prove to be an obstacle with regard to temporal jurisdiction).<sup>189</sup>

The *mens rea* for this punishable act requires both “intent and knowledge relating to the forcible displacement of persons from territory in which they are lawfully present.”<sup>190</sup> According to the conduct studies and findings mentioned in Part II, fossil fuel companies’ officials allegedly knew, through cutting-edge scientific research, about the different impacts of climate change. That being said, however, the multi-causal nature of the harm as well as the considerable gap between the alleged conduct and its specific outcome may prove to be yet another hurdle with regard to the *dolus eventualis* standard of intent, since it may be difficult to show that the corporate officials foresaw that their actions would produce these specific consequences. Nonetheless, the robust body of documentary evidence described in Part II indicates that oil and gas companies “had a deep and profound understanding of the relationships between sea levels, atmospheric temperatures, and carbon in the environment.”<sup>191</sup> These documents suggest that oil and gas corporations and corporate executives have been aware of the effects of rising levels of CO<sub>2</sub> and increased temperatures, including melting ice caps, sea level rise, and warming oceans.<sup>192</sup> This documentary evidence may be used to establish the required *mens rea* for this punishable act.

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188. Prosecutor v. Krnojelac, IT-97-25-A, Appeals Judgment, ¶ 218 (Int’l Crim. Trib. For the Former Yugoslavia Sept. 17, 2003).

189. It has been argued that the act of forcible displacement is not of continuous nature, since it puts an emphasis on the conduct itself. See TRIFFTERER COMMENTARY, *supra* note 40, at 268.

190. TRIFFTERER COMMENTARY, *supra* note 40, at 268.

191. CIEL, SMOKE AND FUMES REPORT, *supra* note 28, at 11.

192. *Id.* at 12, 15.

## ii. Other Inhumane Acts

Article 7(1)(k) also includes “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” as one of the punishable acts under this category of crimes.

Contrary to the Nuremberg Charter and the International Criminal Tribunal for Rwanda (“ICTR”) and International Criminal Tribunal for the Former Yugoslavia (“ICTY”) Statutes, the Rome Statute contains certain limitations on what constitutes an inhumane act, compelling a narrower and more restrictive interpretation than given to similar provisions in those instruments.<sup>193</sup> These limitations pertain both to the action constituting an inhumane act, which must be “of similar character” to the other acts in article 7(1), and to the consequence required as the result of an inhumane act,<sup>194</sup> *i.e.*, “great suffering, or serious injury to body or to mental or physical health.” The similarity assessment, which “involves a value judgment,”<sup>195</sup> is to be conducted “on a case-by-case basis.”<sup>196</sup> Therefore, the possibility of classifying the alleged climate crimes as “other inhumane acts” depends, to a great extent, on prosecutorial and judicial discretion.

It has also been emphasized by the Court that “inhumane acts are to be considered as serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law.”<sup>197</sup>

The ICC’s Pre-Trial Chamber II has noted that:

the language of the relevant statutory provision and the Elements of Crimes, as well as the fundamental principles of criminal law, make it plain that this residual category of crimes against humanity must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity.<sup>198</sup>

Moreover, due to the residual nature of this crime, the Court has concluded that “if a conduct could be charged as another specific crime under this provision, its charging as other inhumane acts is impermissible.”<sup>199</sup> Hence, if the Prosecutor determines that the alleged climate crimes fall within the scope of “deportation or forcible transfer of population,” they may not be charged as “other inhumane acts” (unless there is “at least one

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193. SCHABAS COMMENTARY, *supra* note 38, at 207.

194. Prosecutor v. Katanga, Decision, ¶ 450.

195. TRIFFTERER COMMENTARY, *supra* note 40, at 238, n.576.

196. *Id.* at 239.

197. Prosecutor v. Katanga, Decision, ¶ 448.

198. Prosecutor v. Muthaura, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 269 (Jan. 23, 2012).

199. *Id.*; see also TRIFFTERER COMMENTARY, *supra* note 40, at 237.

materially distinct element that is not adequately reflected in other acts under paragraph 1”).<sup>200</sup>

When examining the different cases in which the Court has made use of this provision, it seems that it has primarily been applied to cases of extreme violence, and seldom has it been discussed with regard to cases of lesser seriousness. Still, it may be applicable to acts of destruction of property, “to the extent that there is evidence that it causes extreme mental suffering.”<sup>201</sup> As for the *mens rea* requirement, article 7(1)(k) explicitly requires that the acts be committed with the intent to cause “great suffering, or serious injury to body or to mental or physical health.” This requirement obviously narrows the scope of this provision even more and makes it difficult to prosecute the alleged climate crimes at issue, which were not committed with such intent (unless a more relaxed understanding of “intent” is adopted, such as *dolus eventualis*).<sup>202</sup>

### C. Climate Crimes as Genocide

The term “genocide” was first introduced in 1944 by Raphael Lemkin. Though not included in the Nuremberg judgment,<sup>203</sup> the crime of genocide was recognized in the 1946 General Assembly Resolution 96(1) and, later on, in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.<sup>204</sup>

As opposed to Lauterpacht’s approach (manifested, as discussed above, in “crimes against humanity”), “which was motivated by a desire to reinforce the protection of each individual, irrespective of which group he or she happened to belong to,”<sup>205</sup> Lemkin focused on the group, since he believed that “individuals were targeted *because* they were members of a particular group, not because of their individual qualities.”<sup>206</sup>

Following Lemkin’s approach, the chapeau of article 6 of the Rome Statute defines genocide as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such . . .” As the Pre-Trial Chamber I of the Court has stated, “the definition of the crime of genocide aims at protecting the existence of a specific group or people.”<sup>207</sup> It should be noted that the provision is restricted to na-

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200. See TRIFFTERER COMMENTARY, *supra* note 40, at 237.

201. See SCHABAS COMMENTARY, *supra* note 38, at 209; *see also* Prosecutor v. Muthaura, Decision, ¶ 279.

202. See text accompanying notes 180–184.

203. See SANDS, *supra* note 13, at 372.

204. Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277.

205. See SANDS, *supra* note 13, at 291.

206. *Id.*

207. SCHABAS COMMENTARY, *supra* note 38, at 135; Prosecutor v. Al Bashir, Decision on the Prosecution’s Application for a Warrant of Arrest, ¶ 115.

tional, ethnical, racial or religious groups,<sup>208</sup> following the definition of the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>209</sup>

In limited circumstances, environmental destruction might qualify as an international crime of genocide: “In some cases, particularly where small indigenous populations are closely tied economically, spiritually and culturally to their land and local environment, severe environmental impacts can threaten the cultural survival of the group.”<sup>210</sup>

However, proving *mens rea* may be a substantial obstacle in this context.<sup>211</sup> As “one of the worst crimes known to humankind,”<sup>212</sup> genocide requires specific intent (*dolus specialis*).<sup>213</sup> Notably, however, in the case of a plan or a policy, the relevance of specific intent declines dramatically, and the focus is on knowledge of the plan or policy rather than on intent (a “knowledge-based approach”).<sup>214</sup>

Because the adverse effects of climate change are experienced by individuals and communities across the globe, irrespective of their affiliation to a certain group, it cannot be claimed that a specific group was targeted by the fossil fuel companies, nor can it be asserted that these companies had any intent to do so. And even if the fossil fuel companies knew with substantial certainty about the eventual need of certain groups to migrate due to climate impacts, they most probably did not have a plan aimed at achieving this outcome.

Curiously enough, in 2010, a proposed amendment to the Rome Statute was submitted by Polly Higgins, urging the ILC to add a fifth crime to the Rome Statute—the crime of ecocide.<sup>215</sup> The proposed amendment, which builds on Lemkin’s concept of “cultural genocide,”<sup>216</sup> defines “ecocide” as “the extensive destruction, damage to or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely

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208. SCHABAS COMMENTARY, *supra* note 38, at 135–36.

209. See Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 204.

210. See Hunter, *Private Sector Liability for Environmental Harm Under International Law*, *supra* note 84, at 38.

211. *Id.* at 39.

212. Prosecutor v. Krstić, IT-98-17-A, Appeals Judgment, ¶ 134 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

213. See SCHABAS COMMENTARY, *supra* note 38, at 25.

214. See *id.*

215. See generally Anja Gauger et al., *The Ecocide Project: ‘Ecocide Is the Missing 5th Crime Against Peace’*, THE HUMAN RIGHTS CONSORTIUM AT THE SCHOOL OF ADVANCED STUDIES, U. LONDON (2012).

216. See *id.* at 6–7.

diminished.”<sup>217</sup> Additionally, a model law suggested by Higgins defined the crime of ecocide as those

acts or omissions committed recklessly in times of peace or conflict by any senior person within the course of State, corporate or any other entity’s activity which cause, contribute to, or may be expected to cause or contribute to serious ecological, climate or cultural loss or damage to or destruction of ecosystem(s) of a given territory(ies), such that peaceful enjoyment by the inhabitants has been or will be severely diminished.<sup>218</sup>

For the purpose of the discussion here, it is worth mentioning that article 3(a) of the proposed model law defined “climate loss” or “damage” or “destruction” as “impact(s) of one or more of the following occurrences, unrestricted by State or jurisdictional boundaries: (i) rising sea-levels, (ii) hurricanes, typhoons or cyclones, (iii) earthquakes, (iv) other climate occurrences.”<sup>219</sup> Article 3(d) added that “[f]or the purposes of paragraph 1: the Paris Agreement of 4 November 2016 shall be considered established premise for prior knowledge by State, corporate or any other entity’s senior person, or any other person of superior responsibility.”<sup>220</sup> It goes without saying that if the crime of ecocide was incorporated into the Rome Statute, it would be extremely relevant to the alleged climate crimes at issue, though attempts to apply it to past crimes would raise issues of retroactivity.

Although this proposal was not adopted at the international level, some states have included a crime of ecocide in their own national penal codes. These states include: Vietnam, Russia, Armenia, Belarus, Republic of Moldova, Ukraine, Georgia, Kazakhstan, Kyrgyzstan, and Tajikistan.<sup>221</sup> If more states will follow suit, a norm of customary international law may emerge; however, this process will obviously take time and also would not apply retroactively.

#### D. *Interim Conclusions*

When examining whether the alleged conduct discussed in this paper can be prosecuted under the Rome Statute, it seems that several provisions of the Rome Statute may apply to the alleged climate crimes. Amongst the different categories of crimes considered here, the category of crimes against humanity is probably the most applicable one. Yet, even with regard

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217. Polly Higgins, ERADICATING ECOCIDE: LAWS AND GOVERNANCE TO PREVENT THE DESTRUCTION OF OUR PLANET 62 (2010); *see also* ECOCIDE LAW, *Proposed Amendment to the Rome Statute*, <https://ecocidelaw.com/the-law/what-is-ecocide>.

218. Anthony J. Colangelo & Peter Hayes, *An International Tribunal for the Use of Nuclear Weapons*, 2 J. PEACE & NUCLEAR DISARMAMENT 219, 232 (2019).

219. *Id.*

220. *Id.*

221. *See* Gauger et al., *supra* note 215, at 12.

to this category of crimes, many doubts and uncertainties remain as to its suitability for prosecuting climate crimes.

In contrast to other crimes, the alleged climate crimes at issue are consequential in nature and have an indirect effect both in the sense that they affect communities and people across the globe irrespective of the place where the crimes were allegedly committed, and because there is a major time interval between the alleged acts and their consequences, since it may take a very long period of time before the effects of a certain act are evident. These unique features pose substantial challenges, with regard to the element of *mens rea* as well as offense specific requirements.

The core crimes in the Statute were tailored—and therefore are far more suited—to the prosecution of actions that take place in a specific time frame, at a particular location on the globe, and that follow a simple pattern or causal chain. Naturally, when dealing with these “classic” forms of crimes, it is easier to examine questions of *mens rea* and the suitability of the different punishable acts to the alleged conduct. Also, questions regarding temporal jurisdiction may be simply resolved, since the harm likely occurred at or around the same time as the offense.

By contrast, climate change is a phenomenon that evolves over a long period of time, as emissions of GHGs stay in the atmosphere for decades (and even longer), and the changes they cause are gradual in nature. Also, GHGs emitted at a certain place spread in the atmosphere across the globe, hence their effect is experienced not only in the place where they were emitted, but also in remote parts of the world. Ultimately, scientific data and modeling is required to explain the causal link between the causes and the effects of climate change. That being said, however, it should be emphasized that judicial tribunals are used to dealing with these sorts of complexities (by using expert opinions, for instance); hence, these difficulties should not stand in the way of prosecuting climate crimes as long as these crimes fall within the scope of the Rome Statute.

Still, the Rome Statute was not drafted with this kind of crime in mind, and, as in many other instances, it seems that the law has not caught up with reality.<sup>222</sup> Arguably, it is the task of the courts to translate the written norms to the changing landscape of crimes, insofar as the language of these norms allows such translation. As the United States Court of Appeals for the Sec-

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222. As has been stated by the ICRC in relation to common article 3 of the Geneva Convention:

It is always dangerous to try to go into too much detail—especially in this domain. However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes.

INT’L COMM. RED CROSS, Commentary on the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 39 (1958, *reprt.* 1994); TRIFFTERER COMMENTARY, *supra* note 40, at 235.

ond Circuit stated in the *Filartiga* case, in the context of the Alien Tort Statute,<sup>223</sup> “[I]t is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”<sup>224</sup>

This approach has the advantage of making use of existing offences to bring immediate action against perpetrators. Nevertheless, it may contradict the principle of non-retroactivity,<sup>225</sup> and raise concerns with regard to legitimacy. The application of this approach to criminal law is even more controversial, as it runs counter to the principle of *nullum crimen sine lege*.

A different approach, taken by several practitioners and scholars, suggests that the Rome Statute should be amended to explicitly include a *sui generis* crime against the environment.<sup>226</sup> Whereas this option may theoretically be a more appropriate and legitimate one, amendment has its disadvantages, in particular, its dependence on political will and global coopera-

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223. Alien Tort Statute, 28 U.S.C. § 1350.

224. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); see also SÉBASTIEN JODOIN & MARIE-CLAIRE CORDONIER SEGGER, SUSTAINABLE DEVELOPMENT, INTERNATIONAL CRIMINAL JUSTICE, AND TREATY IMPLEMENTATION 8 (2013) (“The criminalization of new forms of harm is consistent with the development of international criminal law, which can be seen as the successive extension of the principle of individual accountability to a constantly expanding list of serious violations in international law—piracy and war crimes to begin with; followed by crimes against humanity, aggression, and genocide in the postwar era; later extending to the other crimes of apartheid and torture; and potentially expanding to offences such as terrorism in the near term. What is more, the ad hoc international criminal tribunals have—not without some controversy—consistently expanded the scope of application of existing international crimes to cover a growing variety of acts and conduct, victims, and context.”).

225. See Markus Kotzur, *The Temporal Dimension: Non-Retroactivity and Its Discontents*, in RESEARCH HANDBOOK ON THE LAW OF TREATIES (Christian J. Tams et al. eds., 2014).

226. See, e.g., STEVEN FREELAND, ADDRESSING THE INTENTIONAL DESTRUCTION OF THE ENVIRONMENT DURING WARFARE UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, at 228–29 (suggesting the addition of a crime of environmental destruction during an armed conflict); Gauger et al., *supra* note 222, at 12; Robert McLaughlin, *Improving Compliance: Making Non-State International Actors Responsible for Environmental Crimes*, 11 COLO. J. INT’L ENVTL. L. & POL’Y 377, 392 (2000); Hunter, *Private Sector Liability for Environmental Harm Under International Law*, *supra* note 84, at 59–60. Others have proposed a designated tribunal for environmental issues, though these proposals do not focus on criminal liability. See generally Maya Steinitz, *The Case for an International Court of Civil Justice*, 67 STAN. L. REV. ONLINE 75 (2014); Kenneth F. McCallion & H. Rajan Sharma, *Environmental Justice Without Borders: The Need for an International Court of the Environment to Protect Fundamental Environmental Rights*, 32 GEO. WASH. J. INT’L L. & ECON. (2000). It should also be noted in this context that one of the drafts of the Paris Agreement suggested the establishment of an International Tribunal of Climate Justice. However, this tribunal was intended “to address cases of non-compliance of the commitments of developed country Parties,” and, naturally, it did not deal with corporations. Ultimately, this suggestion was not accepted in the final document. See Ad Hoc Working Group on the Durban Platform for Enhanced Action, *Draft Agreement and Draft Decision on Workstreams 1 and 2*, art. 11.7, No. ADP 2-11 (Oct. 23, 2015).

tion.<sup>227</sup> Additionally, even if States Parties agree to amend the Statute, it will take time,<sup>228</sup> and the amendment will most probably not apply retroactively.

In contrast, the ICC and the core crimes already listed in the Rome Statute may provide, in suitable cases, a ready-made solution. Notably, when the ILC considered adding a separate crime against the environment to the Rome Statute, some members argued that there was no need for a separate crime due to the fact that harm to the environment—where it affects international peace and security—would be punishable as an international crime under other rubrics of the Statute.<sup>229</sup> This approach is also reflected in the OTP Policy Paper, which does not mention any need to amend the Statute as a prerequisite for the prosecution of environmental crimes.

In light of these realities, and as at least some provisions of the Rome Statute may apply to the alleged climate crimes, the article will next explore whether the Rome Statute's existing crimes may and should be interpreted to include environmental crimes. Before that, however, the article will discuss procedural hurdles to the prosecution of the alleged climate crimes.

## V. PROCEDURAL HURDLES TO PROSECUTING CLIMATE CRIMES

According to article 11(2) of the Rome Statute, “the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.”<sup>230</sup> Article 24(1) also clarifies, with respect to individual criminal responsibility, that “[n]o person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.”<sup>231</sup> This temporal threshold is considered an absolute bar to prosecution,<sup>232</sup> deviating from the approach taken by previous international criminal tribunals, which exercised their jurisdiction retroactively.<sup>233</sup>

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227. See Rome Statute, *supra* note 2, art. 121 (stating that an adoption of an amendment to the Statute requires a two-thirds majority of State Parties). Additionally, according to article 121(5), “any amendment to articles 5, 6, 7 and 8 . . . shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.” *Id.*

228. Due to the urgency posed by the climate crisis, time is obviously a crucial factor. See generally IPCC, *Global Warming of 1.5*, *supra* note 155.

229. See *infra* note 254.

230. It should be emphasized that article 11(2) further states that “[i]f a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.” Rome Statute, *supra* note 2, art. 11(2).

231. See SCHABAS COMMENTARY, *supra* note 38, at 341.

232. See TRIFFTERER COMMENTARY, *supra* note 40, at 657.

233. See SCHABAS COMMENTARY, *supra* note 38, at 339.



It is important to note that though in general the entry into force date of the Rome Statute is July 1, 2002,<sup>234</sup> there may be a different entry into force date for each of the States Parties, depending on the date a certain State Party accepted, approved, or acceded to the Rome Statute.<sup>235</sup> Therefore, questions regarding temporal jurisdiction should be determined depending on the states involved.

Accordingly, even if the alleged acts of the fossil fuel companies are found to constitute a crime within the jurisdiction of the Court, the Court will be able to exercise jurisdiction only with regard to crimes committed after the relevant entry into force date.<sup>236</sup> Nevertheless, it should be noted that in cases where the jurisdiction of the Court is “triggered” pursuant to a Security Council referral (in accordance with article 13(b) of the Statute), article 11(2) does not apply, and the Court may exercise its jurisdiction with regard to crimes committed after July 1, 2002,<sup>237</sup> regardless of the specific circumstances pertaining to the state at issue.

Moreover, it should be emphasized that in cases of continuing crimes—when the conduct constitutes an ongoing course of criminal activity or in situations where the *actus reus* is partially completed in the past, but its effects continue after its completion—it may be argued that due to the continuous nature of the acts, the Court may exercise jurisdiction even with regard to acts that took place before the entry into force of the Statute.<sup>238</sup>

In the context of the alleged acts of the fossil fuel companies, the emissions made by these companies stay in the atmosphere for a long period of time and continue to cause climate impacts. This may also be relevant with regard to research funded and communications published prior to the relevant entry into force date, but accessible—*i.e.*, not removed or corrected—after that date. In any case, all emissions and publications that were made after the relevant entry into force date clearly fall within the jurisdiction of the Court. Additionally, and irrespective of the question of temporal jurisdiction, both the ICTR and the ICC have held that evidence relating to acts committed before the entry into force date may be admissible and used in order to establish intent, to demonstrate a pattern of conduct, or to clarify a given context.<sup>239</sup>

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234. See Rome Statute, *supra* note 2, art. 126(1).

235. See *id.* art. 126(2).

236. In this context, it should be noted that according to the CIEL Smoke and Fumes Report, even in recent years, “as the reality of climate change has become all but impossible to deny, the largest companies have adjusted their strategies from outright denial to questioning the human contribution to climate change, the timing and severity of impacts, and the economic feasibility of reducing emissions.” See CIEL, SMOKE AND FUMES REPORT, *supra* note 28, at 18.

237. SCHABAS COMMENTARY, *supra* note 38, at 343.

238. See TRIFFTERER COMMENTARY, *supra* note 40, at 663–69 (referring to cases of forced disappearance, transfer, and forced deportation, and conscripting or enlistment of children under the age of fifteen); see also SCHABAS COMMENTARY, *supra* note 38, at 341–42.

239. See TRIFFTERER COMMENTARY, *supra* note 40, at 669–70.

Another procedural hurdle relates to article 12 of the Statute, which establishes the general rule by which the Court may exercise its jurisdiction over crimes committed on the territory of a State Party or over crimes committed by a national of a State Party anywhere. Where the fossil fuel companies are based in states that are not parties to the Rome Statute, or in cases where the alleged acts were committed on territories of states that are not party to the Statute or by nationals of states that are not parties, it may be argued that the Court does not have jurisdiction. Notably, however, article 12(2) does not apply in the case of a Security council referral. Additionally, due to the complex structure of subsidiaries used by multinational corporations in their operations, it is likely that at least some of their acts were committed in the territory of a State Party or by nationals of one.

To this end, the Court recently ruled in a decision concerning the alleged deportation of members of the Rohingya people from the Republic of the Union of Myanmar to the People's Republic of Bangladesh that "the Court may assert jurisdiction pursuant to article 12(2)(a) of the Statute if at least one element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party to the Statute."<sup>240</sup> Moreover, the Court specifically emphasized that the rationale of its decision is not restricted to the crime of deportation, and it may apply to other crimes within the jurisdiction of the Court as well.<sup>241</sup>

Accordingly, and since the effects of climate crimes are experienced across the globe and are not limited to the territory of the state where they were allegedly committed, there may be an argument that some elements of a crime, or parts of a crime, were committed in the territory of a State Party, thus enabling the Court to assert its jurisdiction pursuant to article 12.<sup>242</sup>

#### VI. CAN—AND SHOULD—THE ROME STATUTE BE INTERPRETED AS ENCOMPASSING ENVIRONMENTAL CRIMES?

As an international treaty, the Rome Statute is subject to the governing principles of treaty interpretation laid down in the 1969 Vienna Convention on the Law of Treaties ("VCLT").<sup>243</sup> Therefore, the Rome Statute "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and

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240. Int'l Crim. Ct., ICC-RoC46(3)-01/18, Decision on the Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute, ¶ 72 (Sept. 6, 2018).

241. *Id.* ¶ 74.

242. Nonetheless, one should bear in mind that in the case of the alleged deportation of the Rohingya people, the different elements of the crime took place more or less in the same timeframe, whereas in the case of the alleged climate crimes, there is a considerable gap between the acts attributed to the corporations (or the corporate officials), on the one hand, and the outcome of these acts, on the other. Therefore, applying this decision to the case at hand will most probably require broad interpretation of this decision.

243. See Vienna Convention on the Law of Treaties ["VCLT"] art. 31, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969).

purpose.”<sup>244</sup> The context of the treaty, for the purpose of interpretation, includes its preamble and annexes.<sup>245</sup>

Several statements in the preamble to the Rome Statute may be read to encompass environmental crimes. For instance, the preamble opens with the statement that States Parties are “[c]onscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time.”<sup>246</sup> Undoubtedly, this “delicate mosaic” is also comprised of the environmental conditions peoples and cultures depend upon. Furthermore, the recognition in the preamble “that such grave crimes threaten the peace, security and well-being of the world”<sup>247</sup> can also be read to include environmental crimes, which clearly threaten the “well-being of the world.” Finally, the goal of securing the needs and interests of future generations<sup>248</sup> cannot be obtained without giving proper consideration to environmental concerns.<sup>249</sup>

Nonetheless, one should bear in mind that as a source of criminal law, the Rome Statute is also governed by the principle of *nullum crimen sine lege*, as well as the rule of “strict construction” drawn from national legal practice.<sup>250</sup> Article 22(2) of the Rome Statute reads: “The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person

244. *Id.* art. 31(1).

245. *Id.* art. 31(2).

246. Rome Statute, *supra* note 2, pmbl.

247. Rome Statute, *supra* note 2, pmbl. (noting that the parties were “[d]etermined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole”).

248. *Id.*

249. See United Nations Educational, Scientific and Cultural Organization, Declaration on the Responsibilities of the Present Generations Towards Future Generations, Res. 29/C/31, art. 1 (Nov. 12, 1997). The Declaration recognizes that

[t]he present generations have the responsibility to bequeath to future generations an Earth which will not one day be irreversibly damaged by human activity. Each generation inheriting the Earth temporarily should take care to use natural resources reasonably and ensure that life is not prejudiced by harmful modifications of the ecosystems and that scientific and technological progress in all fields does not harm life on Earth.

*Id.* art. 4. The obligation to safeguard the rights of future generations is also reflected in a statement by the UN Secretary-General, who described the adoption of the Rome Statute as “a gift of hope to future generations.” See Yuval Shany, *Assessing the Effectiveness of International Courts*, 106 AM. J. INT’L L. 225, 245 n.103 (2014) (citing the statement at the opening of the Preparatory Commission for the International Criminal Court, Feb. 16, 1999).

250. See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 93–95 (5th ed. 2017).

being investigated, prosecuted or convicted.”<sup>251</sup> This interpretive approach is also manifested in the *Elements of Crime* with regard to crimes against humanity,<sup>252</sup> providing that article 7 of the Rome Statute “must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole.”<sup>253</sup>

It should also be noted that the ILC has considered adding a crime against the environment to the Rome Statute. Article 26 of the ILC’s draft Code of Crimes Against the Peace and Security of Mankind criminalizes the act of “willfully caus[ing] or order[ing] the causing of widespread, long-term and severe damage to the natural environment.”<sup>254</sup> At first, it was suggested that a crime against the environment would complement the category of crimes against humanity.<sup>255</sup> However, later on, environmental offenses were “set apart to form a new, autonomous crime.”<sup>256</sup>

Ultimately, the draft article was not incorporated into the final text of the Rome Statute.<sup>257</sup> This may support a narrow interpretive approach to the existing provisions, rejecting the idea that the Rome Statute may be read to

251. See *id.* (arguing that this is a reaction to the liberal approach taken by the judges in the Tadić jurisdictional decision, discussed *infra* note 260).

252. There is no similar requirement in the ICC Elements of Crime with regard to war crimes or genocide (yet, the general rule expressed in article 22(2) applies to these crimes). See ICC Elements of Crime, *supra* note 79.

253. ICC Elements of Crime, *supra* note 79, introduction, ¶ 1; see also SCHABAS COMMENTARY, *supra* note 38, at 152 (noting that “[o]ut of concern with the uncertain parameters of the crime, the drafters of the Rome Statute included extra language designed to restrain efforts at generous or liberal interpretation, most probably in paragraph 2 of article 7”).

254. Int’l Law Comm’n, Document ILC(XLVIII)/DC/CRD, Document on Crimes Against the Environment, Prepared by Mr. Christian Tomuschat, Member of the Commission, U.N. Doc. ILC(XLVIII)/DC/CRD.3 (Mar. 27, 1996); see SCHABAS COMMENTARY, *supra* note 38, at 148; Matthew Gillett, *Environmental Damage and International Criminal Law, in SUSTAINABLE DEVELOPMENT, INTERNATIONAL CRIMINAL JUSTICE, AND TREATY IMPLEMENTATION*, *supra* note 224, at 94.

255. Int’l Law Comm’n, Document on Crimes Against the Environment, *supra* note 254, ¶ 5-6.

256. *Id.* ¶ 8 (noting that—although article 26 borrowed most of its elements from article 55 of Additional Protocol I to the Geneva Conventions of 12 August 1949—article 26, unlike article 55, also applied in times of peace outside an armed conflict); see also Int’l Law Comm’n, Rep. on the Work of the Forty-Third Session, U.N. Doc. A/46/10 (Apr.–July 1991), reprinted in 2 Y.B. Int’l L. Comm’n 107, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (1991) (explaining, in the commentary to article 26, that “[t]he direct source of the present draft article is article 55, paragraph 1, of Protocol I Additional to the 1949 Geneva Conventions” but that “unlike the provision contained in the Protocol, application of this draft article is not confined to armed conflict”). The crime was meant to be interpreted broadly “to cover the environment of the human race and where the human race develops, as well as areas the preservation of which is of fundamental importance in protecting the environment,” *i.e.*, “the seas, the atmosphere, climate, forests and other plant cover, fauna, flora and other biological elements.” *Id.*

257. See Int’l Law Comm’n, Document on Crimes Against the Environment, *supra* note 254, ¶ 9 (describing the different written comments that were received from governments regarding article 26).

include environmental crimes. However, some members of the ILC have expressed the view that

there was no need for a separate article on the subject since damage to the environment, such as willful nuclear pollution or the poisoning of vital international watercourses, would, if it affected international peace and security, be punishable as an international crime under other rubrics of the Code such as aggression, war crimes and international terrorism. In this regard, attention was drawn to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.<sup>258</sup>

This view strongly supports interpreting the Rome Statute as encompassing environmental crimes, as long as these crimes affect international peace and security.

It may also be claimed that there is no basis to distinguish between a crime against the environment and a crime against people in the first place, since environmental and human rights are indivisibly intertwined. Arguably, since a crime against the environment affects people and their most fundamental human rights,<sup>259</sup> it should be punished correspondingly. This categorization of environmental crimes may be viewed as following the “human-being-oriented approach” expressed by the Appeals Chamber of the ICTY in the *Tadić* jurisdictional decision, applying “the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings).”<sup>260</sup> According to this approach, the crimes listed in the Rome Statute should be interpreted as applying to environmental crimes when those affect human beings.<sup>261</sup> Indeed, if environmental crimes have the

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258. Int’l Law Comm’n, Report of the Int’l Law Comm’n on the Work of Its Forty-Seventh Session, *supra* note 229, ¶ 121; *see also* CASSESE ET AL., THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 523 (2002) (asserting that “willful and serious damage to the environment was a fact of life not just for the present, but for future generations”). Article II of the ENMOD Convention defines “environmental modification techniques” as “any technique for changing—through the deliberate manipulation of natural processes—the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.” ENMOD Convention, *supra* note 83, art. II.

259. *See* Marcos Orellana, *Court Embraces Right to a Healthy Environment in the Americas: Ruling Will Empower Citizens*, HUMAN RIGHTS WATCH (Feb. 14, 2018), <https://www.hrw.org/news/2018/02/14/court-embraces-right-healthy-environment-americas> (describing a decision of the Inter-American Court of Human Rights interpreting the American Convention on Human Rights to require state protection of the right to a healthy environment).

260. *Prosecutor v. Tadić*, IT-94-I-T, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 97 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

261. It should be emphasized, though, that the ICTY Appeals Chambers based its broad interpretive approach, *inter alia*, on the unclear language of some of the provisions of the ICTY Statute. For instance, the Chamber noted that article 3 of the ICTY Statute, which was at the center of the discussion in the *Tadić* case, “lacks any express reference to the nature of

same outcomes as other international crimes (in particular in terms of their severity), and the different elements of an existing crime are satisfied, then arguably there is no need to treat environmental crimes differently.

No doubt, this argument reflects a “utilitarian anthropocentric approach, valuing the environment to the extent it is able to serve the interests of human beings,” while an ecocentric approach would grant an intrinsic value to the environment, irrespective of whether human beings suffer as a result of its destruction.<sup>262</sup> Anthropocentrism is open to criticism, and one may argue that nature should have its own legal rights.<sup>263</sup> However, for the sake of the discussion here, it is perhaps more constructive to focus on a crime’s effects on humans since the Rome Statute—and, in particular, the category of crimes against humanity—seems to reflect more of an anthropocentric approach.

The link between harm to the environment and harm to human beings is well demonstrated in the context of the climate crisis. Climate change “affects the social and environmental determinants of health—clean air, safe drinking water, sufficient food and secure shelter,”<sup>264</sup> and therefore, it has indisputable implications on the lives, health, and livelihoods of human beings. Climate change is also associated with migration,<sup>265</sup> as well as with national security issues.<sup>266</sup> The preamble of the Paris Agreement reflects these concerns: “[C]limate change represents an urgent and potentially irreversible threat to human societies and the planet.”<sup>267</sup>

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the underlying conflict required.” See *id.* ¶ 71. Therefore, the ability to draw a conclusion from this decision to the context of the Rome Statute and its elaborated list of crimes may be limited.

262. See Gillett, *supra* note 254, at 75.

263. See Christopher D. Stone, *Should Trees Have Standing?—Towards Legal Rights for Natural Objects*, 45 S. CAL. L. REV., 450 (1972); see also PUBLIC RADIO EXCHANGE, *Living on Earth: The Amazon as Legal Person* (Apr. 20, 2018), <http://www.loe.org/shows/segments.html?programID=18-P13-00016&segmentID=1> (discussing a 2018 ruling of Colombia’s Supreme Court, granting the river and tropical forest of the Colombian part of the Amazon the legal standing of a person, so ‘guardians’ could sue on its behalf for protection).

264. WORLD HEALTH ORGANIZATION, *Climate Change and Health* (Feb. 1, 2018), <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health>.

265. See *supra* Part III.B.2.i.

266. See, e.g., U.S. DEPARTMENT OF DEFENSE, NATIONAL SECURITY IMPLICATIONS OF CLIMATE-RELATED RISKS AND A CHANGING CLIMATE 3 (2015) (“[C]limate change is an urgent and growing threat to our national security, contributing to increased natural disasters, refugee flows, and conflicts over basic resources such as food and water. These impacts are already occurring, and the scope, scale, and intensity of these impacts are projected to increase over time.”); UN Secretary-General, *Climate Change and Its Possible Security Implications*, U.N. Doc. A/64/350 (Sept. 11, 2009); Statement by the President of the Security Council, U.N. Doc. S/PRST/2011/15 (July 20, 2011); Letter From the Permanent Representative, New Zealand, to the Secretary General, United Nations, U.N. Doc. S/2015/543 (July 15, 2015).

267. Paris Agreement, *supra* note 145.

The connection between environmental degradation and human rights is also manifested in the Human Rights Committee's interpretation of article 6 of the ICCPR. According to the Human Rights Committee's General Comment 36, "Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life."<sup>268</sup> Thus, the well-established link between environmental degradation and the threats it poses to human societies supports the interpretation of crimes aimed at protecting human beings as relevant to environmental crimes as well.<sup>269</sup>

In sum, the competing considerations mentioned above may be used to support different (and opposing) conclusions, depending on the agenda one wishes to promote. Therefore, the question of whether the Rome Statute may be read to include environmental crimes seems to be a matter of discretion. Indeed,

the process of establishing the jurisdiction of international courts over disputes referred to them inevitably contains strong discretionary features. Through the discretion they exercise at a number of critical legal junctures that present themselves in the adjudicative procedure, international courts are able to exercise some degree of case selection, which tends to be category-based, and not case-specific.<sup>270</sup>

Although this notion pertains to the discretionary power of international courts, it may be applied, *mutatis mutandis*, to the interpretive process conducted by the OTP in determining whether a certain case should be investigated and prosecuted. Given that the OTP Policy Paper details the criteria for case selection, one may naturally assume that these policy considera-

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268. General Comment 36, *supra* note 124, art. 62; *see also* Portillo Cáceres v. Paraguay: Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2751/2016, U.N. Doc. CCPR/C/126/D/2751/2016, Human Rights Comm. (Sept. 20 2019), (expressing the view that environmental degradation constitutes a violation of article 6 and article 17 of the International Covenant on Civil and Political Rights—the right to life and the right to freedom from arbitrary or unlawful interference with privacy, family, or home, respectively); *see also* Human Rights Comm., Teitiota v. New Zealand: Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2728/2016, U.N. Doc. CCPR/C/127/D/2728/2016, ¶ 9.11 (January 7 2020) (expressing the view that “without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant”).

269. This link may also support the notion of corporate liability, given the “corporate duty to respect human rights.” *See* U.N. Guiding Principles on Business and Human Rights, *supra* note 49.

270. YUVAL SHANY, QUESTIONS OF JURISDICTION AND ADMISSIBILITY BEFORE INTERNATIONAL COURTS 104 (2016). Additionally, “the most important occasion for the exercise of judicial discretion in connection with case selection, applied by all international courts, involves the interpretation of the judicial provisions governing their operation.” *Id.* at 105.

tions—including the focus on environmental crimes—will be taken into account by the Prosecutor in the process of determining whether the alleged conduct of fossil fuel companies falls within the scope of the Court’s jurisdiction. The Court, however, is obviously not bound by these policy considerations and is free to exercise different ones. Nevertheless, the mere existence of these explicit policy goals may prompt a discussion with regard to environmental crimes and bring them into the spotlight in the adjudicative procedure.

This discussion may include, *inter alia*, the different considerations that warrant prosecution before the ICC, rather than resolution through non-criminal avenues or before national jurisdictions. Indeed, as in many other instances, criminal prosecution is not necessarily the only way to achieve the goals of justice, deterrence, public condemnation, and utility. Nonetheless, the international community has found it important, for various reasons, to establish a permanent international criminal court, so that those who commit “the most serious crimes of concern to the international community as a whole,” and that “threaten the peace, security and well-being of the world” will “not go unpunished.”<sup>271</sup> Therefore, one may argue that there is no justification for excluding from the jurisdiction of the Court severe and irreversible environmental crimes that threaten the peace, security, and well-being of the world.

Moreover, prosecuting environmental crimes before the ICC—if deemed possible—will play an important role in generating deterrence. In the case of corporate environmental crimes, not only will it have a profound impact on corporate officials, but it will also be a game-changer with regard to the corporations themselves; the risk of criminal prosecution and the heavy damage it might cause could lead to a deep organizational change at the firm level.

Furthermore, in addition to ending impunity and generating deterrence, the prosecution of environmental crimes before the ICC will also play a crucial role in promoting the global acceptance of international norms regarding the recognition of environmental crimes, and will also support the development of international criminal law.<sup>272</sup> Additionally, “as international trials are, by definition, more visible and are often regarded more credible than national proceedings, holding trials at the ICC signals the determination of the international community to stigmatize deviant behavior.”<sup>273</sup> Hence, prosecution before the ICC could convey a loud and clear message of condemnation. Finally, due to the fact that the Rome Statute enables the participation of victims in the proceedings<sup>274</sup> and sets forth a mechanism for

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271. Rome Statute, *supra* note 2, pmbl.

272. See Shany, *Assessing the Effectiveness of International Courts*, *supra* note 249, at 227–29.

273. *Id.* at 236.

274. Rome Statute, *supra* note 2, art. 68.



the reparation to victims,<sup>275</sup> prosecution before the ICC may also serve the goal of victim satisfaction.<sup>276</sup> For instance, in the context of the alleged climate crimes, this may be used to provide financial support to climate mitigation and adaptation efforts in communities vulnerable to the adverse effects of climate change.

True, it may be argued that environmental crimes should be prosecuted before national jurisdictions and not necessarily before the ICC. However, this argument applies equally to other international crimes, and questions regarding the appropriate forum should be resolved in accordance with the rules pertaining to the principle of complementarity,<sup>277</sup> which is “part of the Court’s DNA” and “represents the express will of States Parties to create an institution that is global in scope while recognizing the primary responsibility of States themselves to exercise criminal jurisdiction.”<sup>278</sup> It is important to note that this principle is also reflected in the OTP Policy Paper, which explicitly recalls “that the goal of the Statute to combat impunity and prevent the recurrence of violence” is “to be achieved by combining the activities of the Court and national jurisdictions within a complementary system of criminal justice.”<sup>279</sup>

## VII. CONCLUSIONS

The discussion above demonstrates that the question of whether corporations (or corporate officials) can be prosecuted for climate crimes before the ICC is mostly a matter of prosecutorial and judicial discretion. The language of the Rome Statute presents several significant hurdles to prosecution, both in terms of the Court’s subject-matter jurisdiction and its personal jurisdiction. However, whereas the explicit wording of article 25(1) will probably be more difficult to overcome by purposive interpretation, it seems that the language of the core crimes (and, in particular, crimes against humanity) grants more leeway for creative interpretation, thus making the question at issue heavily dependent on the willingness of the Prosecutor and the Court to go the extra mile and expand the scope of existing international crimes to cover new forms of harm.

Given the substantial challenges to prosecution described above, and considering that the notion of applying the Rome Statute to the circumstances of corporate climate crimes includes a number of “firsts,” perhaps the OTP will opt for a one-step-at-a-time approach. For instance, the OTP may choose to prosecute corporate executives for alleged crimes, and leave the issue of the ICC’s jurisdiction over legal persons for another day. That

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275. *Id.* art. 75.

276. *See* Shany, *Assessing the Effectiveness of International Courts*, *supra* note 249, at 232–33.

277. *See* Rome Statute, *supra* note 2, pmbl. ¶ 10 and arts. 1, 17.

278. *See* SCHABAS COMMENTARY, *supra* note 38, at 447.

279. *See* OTP Policy Paper, *supra* note 1, ¶ 7.

being said, however, it may be that expanding the scope of crimes to include crimes against the environment and broadening the category of perpetrators to encompass corporations go hand in hand, due to the enormous impact multinational corporations have on environmental issues.

This article sought to examine the broad question of holding corporations criminally accountable for environmental destruction, through the prism of climate crimes. It seems that the gravity of climate change, its profound effect on communities, wildlife, and future generations, and its irreversible nature, make it a good test case in this context. In particular, the urgency posed by the climate crisis well illustrates the importance of using existing tools in order to tackle new threats to the international community as a whole.

The need to adapt international law to contemporary challenges and to “adjust its norms to new battlefield conditions, as well as to new patterns of atrocities conduct”<sup>280</sup> is reflected in the priorities set forth in the OTP Policy Paper. Though the practical implications of the Policy Paper still remain to be seen, if holding corporations or corporate executives criminally accountable for environmental crimes at the international level is possible, not only will it promote the goals of justice and deterrence, but it will also accelerate the development of more robust norms pertaining to corporate accountability in international environmental law.

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280. See Shany, *Assessing the Effectiveness of International Courts*, *supra* note 249, at 229.

